DOCKET

No. 88-774-CFX
Status: GRANTED

Title: Newman-Green, Inc., Petitioner
v.
Alejandro Alfonzo-Larrain, et al.

Docketed:
October 25, 1988

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Neal,Phil Caldwell

Counsel for respondent: Albert,Charles G.

Entry	Date	Note	Proceedings and Orders
1	Oct 25 1988	G	Petition for writ of certiorari filed.
2	Dec 7 1988		Brief of respondent Alejandro Alfonzo-Larrain in opposition filed.
3	Dec 14 1988		DISTRIBUTED. January 6, 1989
4	Dec 29 1988	X	Reply brief of petitioner Newman-Green, Inc. filed.
5	Jan 9 1989		Petition GRANTED.
			**********
6	Feb 16 1989		Record filed.
		*	Certified copy of C. A. proceedings received.
7	Feb 23 1989		Brief of petitioner Newman-Green, Inc. filed.
8	Feb 23 1989		Joint appendix filed.
9	Mar 8 1989		SET FOR ARGUMENT, APRIL 24, 1989. (2nd CASE)
10	Mar 24 1989		Brief of respondent Alejandro Alfonzo-Larrain filed.
11	Mar 28 1989		CIRCULATED.
12	Apr 15 1989	X	Reply brief of petitioner Newman-Green, Inc. filed.
13	Apr 19 1989		Record filed.
		*	Certifed copy of original record, box, received.
14	Apr 24 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-774

No.

Supreme Court, U.S.
FILED
OCT 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEWMAN-GREEN, INC.,

Petitioner,

v.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PHIL C. NEAL*
208 South LaSalle Street
Chicago, Illinois 60604
(312) 269-8000
Attorney for Petitioner

**Counsel of Record*

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Chicago, Illinois 60604

CHAS. P. YOUNG COMPANY

QUESTIONS PRESENTED

1. Do the Courts of Appeals have power to cure a defect in subject-matter jurisdiction, first noticed on appeal, by permitting the plaintiff to dismiss a nonessential nondiverse defendant?

2. Is such curative action at the appellate level authorized by either 28 U.S.C. § 1653 or by Rule 21 of the Federal Rules of Civil Procedure or by a combination of both?

3. If not, is the power to permit such curative action implied or inherent in the appellate jurisdiction conferred by 28 U.S.C. §§ 1291 and 1292?

STATEMENT PURSUANT TO RULE 21.1(b)

The caption of the case in this Court lists all parties to the proceeding in the court of appeals.

STATEMENT PURSUANT TO RULE 28.1

The following corporations are affiliates of Newman-Green, Inc.: Arnel Industries, Inc.; Microlon Corp.; Sau-Tuk Industries, Inc.; Twin Lakes Manufacturing, Inc.; and 151 Interstate Road Corp. Newman-Green, Inc. has no parent or subsidiary corporations, other than wholly-owned subsidiary corporations.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEWMAN-GREEN, INC.,

Petitioner,

v.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Newman-Green, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, entered in this proceeding on August 11, 1988.

OPINIONS BELOW

The majority, concurring, and dissenting opinions rendered by the Court of Appeals on *en banc* rehearing are reported at 854 F.2d 916 and are reproduced in the Appendix at pp. A-1—A-48. The panel opinion which was vacated by the *en banc* decision is reported at 832 F.2d 417 and is reproduced in the Appendix at pp. B-1—B-10. The memorandum opinion and order of the district court that was the subject of the appeal is not reported and is reproduced in the Appendix at pp. C-1—C-30. The supplemental opinion and order of the district court pursuant to Rule 54(b) is

reproduced in the Appendix at pp. D-1—D-4. Opinions of the district court at earlier stages of the action are reported at 590 F.Supp. 1083, 605 F.Supp. 793, and 612 F.Supp. 1434.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

United States Code, Title 28:

§ 1653. Amendment of pleadings to show jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Federal Rules of Civil Procedure:

Rule 21. Misjoinder and Non-joinder of Parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

STATEMENT OF THE CASE

This action was brought in 1982 by petitioner Newman-Green, Inc., an Illinois corporation, to recover payments due under a license agreement whereby petitioner had licensed Newman-Green de Venezuela, a Venezuelan corporation, to manufacture aerosol valves using petitioner's trademarks and trade secrets. The complaint named as defendants the licensee corporation and five individuals who were guarantors of the royalties due under the license. Four of the individual defendants were Venezuelans. The fifth, one Bettison, was alleged to be a United States citizen resident in Venezuela. The jurisdiction of the district court was

invoked under 28 U.S.C. § 1332(a)(3), which provides jurisdiction over actions "between . . . citizens of different States and in which citizens or subjects of a foreign state are additional parties."

Between 1982 and 1986 there were extensive proceedings in the district court, resulting in a number of opinions dealing with the merits. *See, e.g.*, 590 F.Supp. 1083 (1984), 605 F.Supp. 793 (1985), 612 F.Supp. 1434 (1985). In 1986 the district court entered a partial summary judgment disposing of all claims of petitioner against the guarantors, and directed the entry of final judgment pursuant to the partial final judgment provisions of Rule 54(b) of the Federal Rules of Civil Procedure. The district court's judgment awarded petitioner some $200,000 against the guarantors for unpaid royalties due from the licensee until notice of termination of the license, but gave judgment for the guarantors as to amounts due for a subsequent period during which the licensee had continued to manufacture and sell, on the ground that the latter amounts were not "royalties" within the meaning of agreement of guaranty. Petitioner appealed that adverse judgment.

At oral argument a member of the panel noted that subject-matter jurisdiction appeared to be lacking because the complaint did not allege that the defendant Bettison was a citizen of any State. None of the parties or the district court had noted the defect. The panel invited supplemental submissions by the parties, and suggested to petitioner that the defect might be cured by dismissing Bettison as a party. In response petitioner filed a motion to dismiss Bettison; the defendant guarantors moved to dismiss the appeal.

Thereafter the panel rendered a unanimous opinion in which it (1) held that because Bettison was "stateless" complete diversity was lacking and jurisdiction could not be founded on 28 U.S.C. § 1332(a)(3); (2) held that the defect in jurisdiction could be cured by petitioner's dismissal of Bettison as a defendant; and (3) granted petitioner's motion to dismiss Bettison, but specified that the dismissal was with

prejudice. The panel went on to decide the merits, reversing the district court and holding that the guarantors were liable for royalties for the period subsequent to the license termination.

On rehearing *en banc*, the court in an opinion by Posner, J. held that a court of appeals has no power to dismiss a party in order to retain federal jurisdiction. In reaching that conclusion the court held that 28 U.S.C. § 1653 may not be construed to permit amendments to pleadings that have the effect of creating jurisdiction retroactively, and that neither Rule 21 of the Federal Rules of Civil Procedure nor the concept of inherent jurisdiction could supply such authority either. However, acknowledging that Rule 21 has long and often been treated as permitting the district courts to remedy a lack of diversity by dismissing a nondiverse party at any stage of a proceeding, the court remanded the case to the district court to decide whether Bettison should be dismissed or the case should be dismissed for lack of jurisdiction.

Three members of the court (comprising the panel that initially heard the appeal) dissented in an opinion by Easterbrook, J. A fourth member of the court, Cudahy, J., filed an opinion concurring in the result reached by the majority.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS IN OTHER CIRCUITS PERMITTING PARTIES TO BE DROPPED ON APPEAL IN ORDER TO SUSTAIN DIVERSITY JURISDICTION.

In holding that the courts of appeals are powerless to permit an amendment of the complaint dropping a nondiverse party in order to remedy a defect in subject-matter jurisdiction, the decision below conflicts directly with decisions of the courts of appeals for the District of Columbia Circuit and the Ninth Circuit. *Long v. District of Columbia*, 820 F.2d 409, 416-17 (D.C. Cir. 1987); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d

1519, 1523 n.3 (9th Cir. 1987); *Othman v. Globe Indemnity Co.*, 759 F.2d 1458, 1463 (9th Cir. 1985); *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 456-57 (9th Cir. 1980); *Fidelity & Casualty Co. v. Reserve Insurance Co.*, 596 F.2d 914, 918 (9th Cir. 1979); *see also Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302, 304 (9th Cir. 1987) (appellate court may permit "dismissal of a nonessential nondiverse party").

In addition, the decision conflicts in principle with decisions of the Second Circuit holding (1) that the court of appeals may permit an amendment of the complaint deleting claims in order to maintain appellate jurisdiction (*Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189 (1984)) and (2) that the court of appeals may permit an amendment of the complaint deleting nonexhausted claims in order to permit appellate consideration of the merits of a habeas corpus petition *(Rock v. Coombe,* 694 F.2d 908, 914 (1982)). In the *Caspary* case the court referred to the power of district courts to rectify diversity jurisdiction by allowing the dropping of a nondiverse party and said, "We see no reason why an appellate court may not also do so. . . . It would be a waste of judicial resources to remand this matter to the district court for an initial determination." 725 F.2d at 191-92.

As noted in the dissenting opinion below, (Appendix p. A-22, *infra)* no recent authority has reached the result of the decision in this case, although a substantial body of earlier authority, tracing to *Continental Life Insurance Co. v. Rhoads,* 119 U.S. 237 (1886), had held that only the district court, not an appellate court, could permit amendments to rectify jurisdictional defects. The *en banc* opinion below relies upon and follows the Seventh Circuit's own 1942 decision in *Alderman v. Elgin, Joliet & Eastern Ry. Co.,* 125 F.2d 971. In *Carson v. Allied News Co.,* 511 F.2d 22 (7th Cir. 1975) the court, in an opinion by Stevens, J., while expressing doubt of its power to dismiss the nondiverse

party or parties in view of the prior line of cases, had noted the possibility that 28 U.S.C. § 1653 might call for a different result but found it unnecessary to resolve the issue. 511 F.2d at 24.

The frequency with which the problem in this case has arisen over the years at the appellate level is suggested not only by the number of cases cited and discussed in the opinions below but also by the sizable number of additional cases referred to in those cases. *See, e.g., Dollar S.S. Lines, Inc. v. Merz,* 68 F.2d 594 (9th Cir. 1934). The Seventh Circuit's decision in this case is likely to stimulate additional controversy and conflicts when similar issues arise in other circuits, in view of the sharp clash of viewpoints and analysis reflected in the opinions below.

It is unlikely that further litigation will result in greater illumination of the issues. For all these reasons it is appropriate and important that the conflict among the circuits be resolved in this case.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS AFFECTING THE EFFICIENT ADMINISTRATION OF THE BUSINESS OF THE FEDERAL COURTS.

Not only in its direct effects but also in its broader implications, the prevailing opinion below raises questions important to the administration of justice in the federal courts. The rule adopted means at a minimum that in every case in which a jurisdictional defect, readily curable by deletion of a party, is first noted on appeal, one round of appellate proceedings is wasted and a new round of proceedings at the district-court level is compelled. More broadly, the decision's cramped reading of Section 1653 and its rejection of any other source of authority in the court of appeals to short-cut a return trip through the district court would, if followed, constrict the ability of the courts of appeals to deal efficiently with other jurisdictional problems appearing at the appellate level. Further, the importance

attached by the prevailing opinion to the distinction between "creating jurisdiction retroactively" and merely correcting "defective allegations of jurisdiction" seems to be a fertile breeding ground for the kind of artificial controversy long engendered by the recently interred *Enelow-Ettelson* doctrine. *See Gulfstream Aerospace Corp. v. Mayacamas Corp,* — U.S. —, 108 S.Ct. 1133, 1138-43 (1988).

Whether the costs of the rule adopted by the Seventh Circuit in wasted judicial resources and delay to other litigants are outweighed by any arguable gains in alertness of parties and district courts to the esoterica of federal jurisdiction is a matter that merits this Court's judgment.

These reasons for granting certiorari are reinforced by the sharp inconsistency between the decision below and this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952). *Mullaney* did not involve the dropping of a nondiverse party and is therefore distinguishable on its facts. But *Mullaney* permitted the addition, in this Court, of new parties deemed necessary in order to present a justiciable case—an amendment of the pleadings that created subject-matter jurisdiction "retroactively" as assuredly as dropping a nondiverse party. The Court said:

> To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below.

342 U.S. at 417.

The Court in *Mullaney* referred to Rule 21 of the Federal Rules of Civil Procedure, observing that the Rule "will rarely come into play at this stage of a litigation." *Id.* Other cases have treated the Rules as authorizing amendment of pleadings on appeal. *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Caspary v. Louisiana Land and Exploration Co.*, 725 F.2d 189 (2d Cir. 1984); *Denny v. Barber*, 576 F.2d

465, 471 (2d Cir. 1978); *Long v. District of Columbia*, 820 F.2d 409, 416-17 (D.C. Cir. 1987). The *en banc* opinion of the Seventh Circuit in the instant case treats Rule 21 as irrelevant to the authority of the courts of appeals. (Appendix p. A-17.) That opinion also rejects both 28 U.S.C. § 1653 and "inherent" power as possible sources of authority to permit dismissal of a nondiverse defendant. Clarification by this Court is needed not only as to the reach of § 1653 but as to the interplay between the statute, the Federal Rules, and the implied or inherent authority of the courts of appeals pursuant to the appellate jurisdiction conferred by 28 U.S.C. §§ 1291 and 1292 to remedy jurisdictional defects first appearing on appeal.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

PHIL C. NEAL
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000
Attorney for Petitioner

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1195

NEWMAN-GREEN, INC.,

Plaintiff-Appellant,

v.

ALEJANDRO ALFONZO-LARRAIN R., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 7933—**Milton I. Shadur**, *Judge.*

ARGUED SEPTEMBER 14, 1987—DECIDED OCTOBER 28, 1987
REARGUED EN BANC MAY 26, 1988—
DECIDED AUGUST 11, 1988

Before BAUER, *Chief Judge*, and CUMMINGS, WOOD JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* We vacated the panel decision and took the case en banc to decide whether a court of appeals is empowered to dismiss a party in order to retain federal jurisdiction. Previous decisions by this court had answered the question "no," but the panel disagreed and held that we may do this, 832 F.2d 417, 419-20 (7th Cir. 1987), and it went on to reverse the district court on the merits. The full court adheres to our previous decisions. "Where the record reveals no jurisdiction, we are

powerless to do anything but recognize the defect." *Alderman v. Elgin, Joliet & Eastern Ry.*, 125 F.2d 971, 973 (7th Cir. 1942); see also *Carson v. Allied News Co.*, 511 F.2d 22 (7th Cir. 1975). The record reveals no jurisdiction, so we remand the case to the district court—of course without expressing any view on the merits—for such further proceedings as may be consistent with our jurisdictional ruling.

The suit began in 1982 when the plaintiff, Newman-Green, Inc., filed a complaint in the federal district court against five individuals who had guaranteed a debt owed to the plaintiff. The district court had no jurisdiction over the case. The naming of Bettison—a citizen of the U.S. but not of any state—as a defendant had destroyed complete diversity, *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980) (per curiam); see 28 U.S.C. § 1332(a); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Fidelity & Deposit Co. v. City of Sheboygan Falls*, 713 F.2d 1261, 1264 (7th Cir. 1983); 13B Wright, Miller & Cooper, Federal Practice and Procedure § 3621 (2d ed. 1984); cf. Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 9-10 (1968), and there was no possible basis of federal jurisdiction except diversity, since the complaint was based exclusively on state law.

Years passed. Extensive discovery, virtually all of it directed against Bettison, was conducted, and the district judge made numerous rulings, climaxed by the grant of summary judgment for the defendants—all this in a suit over which the court had no jurisdiction. Still acting without jurisdiction, the district court entered a final judgment for the defendants under Rule 54(b) of the Federal Rules of Civil Procedure. On October 28, 1987, almost five years after the complaint had been filed, the panel before which the plaintiff's appeal had been argued—having itself raised the jurisdictional issue at oral argument, and having invited supplemental memoranda in which the plaintiff asked the panel to order Bettison dismissed and the defendants asked the panel to order the case dismissed—dismissed Bettison and proceeded to the merits.

Protracted proceedings have unfolded in a case over which the district court never acquired jurisdiction. For us now to confer jurisdiction on the district court retroactively to the date of the complaint—to pretend that Bettison was never a party—would violate the principle that the existence of federal jurisdiction depends on the facts when the complaint is filed, not on later facts. See, e.g., *New Orleans & Bayou Sara Mail Co. v. Fernandez*, 79 U.S. (12 Wall.) 130, 134 (1870); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938); *Fidelity & Deposit Co. v. City of Sheboygan Falls*, *supra*, 713 F.2d at 1266; *Field v. Volkswagenwerk AG*, 626 F.2d 293, 304-05 (3d Cir. 1980). "Jurisdiction cannot be obtained retroactively." *Denberg v. United States Railroad Retirement Bd.*, 696 F.2d 1193, 1197 (7th Cir. 1983). To the same effect see *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 381-82 (1884) (a case, like the present one, in which complete diversity was lacking when the case was brought); *American Nat'l Bank & Trust Co. v. Bailey*, 750 F.2d 577, 585 (7th Cir. 1984); *Illinois v. General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982).

To the principle that federal courts cannot obtain jurisdiction retroactively, as to virtually every legal generalization, there are exceptions. One is where a court of appeals assumes jurisdiction over a partial final judgment entered under Fed. R. Civ. P. 54(b) *after* the notice of appeal had been filed. See, e.g., *Sutter v. Groen*, 687 F.2d 197, 199 (7th Cir. 1982); *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1068 (7th Cir. 1981). That exception, however, involves form rather than substance, and in any event is within the specific curative provision of Rule 4(a)(2) of the Federal Rules of Appellate Procedure: "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." Where the exercise of jurisdiction is discretionary (as with pendent jurisdiction), events occurring after the filing of the suit may result in or even compel a decision to relin-

quish that jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). But that is not a case of obtaining jurisdiction retroactively. More important, a decision not to exercise jurisdiction presupposes the presence of jurisdiction, not its absence. "The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation." *Id.* at 727. And when pendent jurisdiction is relinquished, the district court need not dismiss the case (as it would have to do if it lacked jurisdiction); it may in appropriate cases remand it to a state court. *Carnegie-Mellon University v. Cohill*, 108 S. Ct. 614, 619 (1988). A genuine and significant exception to the principle that jurisdiction cannot be conferred retroactively is discussed later in this opinion.

We can find no source for a power in a court of appeals to preserve diversity jurisdiction by dismissing a nondiverse party retroactively to the date the suit was filed. The source cannot be 28 U.S.C. § 1653, which authorizes us merely to amend "defective *allegations* of jurisdiction." (Emphasis added.) The predecessor statute (enacted in 1915) expressly limited such amendments to cases in which diversity jurisdiction "in fact existed at the time the suit was brought or removed, though defectively alleged." Act of March 3, 1915, ch. 90, 38 Stat. 956, 28 U.S.C. § 399 (1940 ed.); see *Dollar S.S. Lines, Inc. v. Merz*, 68 F.2d 594, 595 and n. 1 (9th Cir. 1934); *Carson v. Allied News Co.*, *supra*, 511 F.2d at 24 n. 6; *Thomas v. Anderson*, 223 Fed. 41, 43 (8th Cir. 1915). The Revision Note to section 1653 says that, besides the extension of the power to amend from diversity cases to all cases, "changes were made in phraseology." A change from permitting a defective allegation to be amended in order to reflect more accurately the facts that create federal jurisdiction to permitting federal jurisdiction to be conferred retroactively would be more than a change in phraseology. There is a difference between a case in which the complaint alleges that a defendant is a "resident" of a state different from the plaintiff's, thus leaving open

the possibility that he is a "citizen" of the plaintiff's state—but in fact the defendant is a citizen of a state other than the plaintiff's—and a case in which the defendant is a citizen of the plaintiff's state. In the first case section 1653 allows us to correct the complaint in order to show that the case is, in fact though not in pleading, within the diversity jurisdiction. (For a collection of such cases see 13B Wright, Miller & Cooper, *supra*, § 3611, at p. 518 n. 30.) In the second case the defect is not in the allegations—the "defect" is that the case is not within federal jurisdiction—and section 1653 is inapplicable.

Like any other piece of legislative history, a reviser's note is not conclusive. If the language of section 1653, or the events that led to its passage, showed that Congress wanted to empower the courts of appeals to preserve jurisdiction by adding or dropping parties, the Revision Note would have to give way. But the contrary is true. The language of the statute suggests that its only purpose was to extend the power to cure defective allegations from diversity cases to all cases. The previous statute had distinguished between the existence of jurisdiction and its being "defectively alleged," and the reference to allegations was carried forward into section 1653. There is no hint that the authors of the new statute (who were also, of course, the authors of the Revision Note) wanted to authorize courts of appeals to create jurisdiction in district courts retroactively.

The 1915 statute, the predecessor of section 1653, had, as its wording shows, been intended to overrule cases like *Denny v. Pironi & Slatri*, 141 U.S. 121, 124 (1891), a case of defective allegation of jurisdiction where the Court had held that "a case cannot be amended here so as to show [*show*, not *create*] jurisdiction, but the court below, in its discretion, may allow it to be done," and *Continental Life Ins. Co. v. Rhoads*, 119 U.S. 237 (1886), a similar case. The statute had not been intended to erase the distinction between "an existing diversity of citizenship defectively alleged," *Thomas v. Anderson*, *supra*, 223 Fed. at 43, and an absence of diversity jurisdiction. The original statute had made a re-

mand to the district court to correct a defective jurisdictional allegation no longer necessary in diversity cases. Now, thanks to the amended statute, the court of appeals can correct such allegations in other types of cases as well.

But that is as far as section 1653 goes; to interpret it as going further would be to give an innocuous "change . . . in phraseology" far-reaching substantive effect. The mistake in the present case was not in the allegation; it was in the assertion of federal jurisdiction over a case not within that jurisdiction. So clear is the inapplicability of section 1653—from its language and history, from the Revision Note, and from the background principle that jurisdiction cannot attach retroactively—that all seven circuits to have discussed the scope of section 1653 have said that it is intended only to enable the courts of appeals to remedy inadequate jurisdictional allegations, not defective jurisdiction itself. Besides *Carson*, and our later decision in *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1079 (7th Cir. 1986) ("section 1653 of the Judicial Code, which allows defective allegations of jurisdiction to be corrected even on appeal, can thus be of no help to Fletcher [a plaintiff who had failed to demonstrate that his diversity claim had been worth more than $10,000 when filed]. His problem is not just pleading but also proof; we simply do not know whether his claim met the statutory minimum at the relevant time"), see *Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1457 n. 1 (11th Cir. 1987); *Rockwell International Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302, 304 (9th Cir. 1987); *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 512 (5th Cir. 1985); *Aetna Casualty & Surety Co. v. Hillman*, 796 F.2d 770, 775-76 (5th Cir. 1986); *Pressroom Unions, Etc. v. Continental Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983); *Brennan v. University of Kansas*, 451 F.2d 1287, 1289 (10th Cir. 1971); *Field v. Volkswagenwerk AG*, *supra*, 626 F.2d at 306.

No statute or rule authorizes us, by the expedient of dropping—retroactively to the date the complaint was filed—

an inconvenient party whose presence destroyed jurisdiction, to enter a judgment on the merits in a case that has never been within the jurisdiction of the federal courts. If the party is a nominal party, whose presence or absence does not affect jurisdiction, *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421, 451 (1823); *Wood v. Davis*, 59 U.S. (18 How.) 467 (1856); *Bacon v. Rives*, 106 U.S. (16 Otto) 99 (1882); *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 461 (1980); *Matchett v. Wold*, 818 F.2d 574, 576 (7th Cir. 1987); *Iowa Public Service Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977), there is no harm in dismissing him, though no point either, cf. *Chathas v. Smith*, 848 F.2d 93 (7th Cir. 1988). The dismissal of such a party is a mere gesture, and the issue of power does not arise. "[I]f the 'nondiverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction. And such a party may be dropped from the case." *Iowa Public Service Co. v. Medicine Bow Coal Co.*, *supra*, 556 F.2d at 404 (citations omitted).

A similar type of case is where the real party in interest is substituted for a nominal party. *Mullaney v. Anderson*, 342 U.S. 415 (1952), was a suit by a fishermen's union and its secretary-treasurer on behalf of nonresident union members, challenging the constitutionality of a statute that imposed a higher tax on nonresident fishermen than on local fishermen. In the Supreme Court the defendant for the first time questioned the plaintiffs' standing to maintain the suit on behalf of the nonresident union members. (It is now plain that the union did have standing. See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).) In response the union moved to add two of those members as plaintiffs, and the Supreme Court granted the motion. "The original plaintiffs alleged without contradiction that they were authorized by the nonresident union members to bring this action in their behalf. This claim of authority is now confirmed in the petition supporting the motion to add the member-fishermen as plaintiffs. To grant the motion merely puts the principal, the real party in in-

terest, in the position of his avowed agent." *Id.* at 417. It was as if the complaint had mistakenly named the lawyer rather than the client as the plaintiff. Mistakes of a clerical or otherwise purely nominal character can generally be corrected at any time, cf. Fed. R. Civ. P. 60(a); but cf. *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988), but no one suggests that bringing Bettison into this suit as a defendant was a mistake of that character.

Willingham v. Morgan, 395 U.S. 402, 407 n. 3 (1969), and *Rogers v. Paul*, 382 U.S. 198 (1965), likewise involved the correction of purely technical deficiencies. *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 188 (1825), may or may not have been such a case. In one place the Court described the joinder of the nondiverse parties as a "mistake" (*id.*), but in another (on the same page) the Court treated the suit as if it were two suits, one satisfying the requirement of complete diversity, the other dismissable and dismissed. In any event, *Carneal* involved the power of a district court, not of an appellate court, to save jurisdiction by dismissing a party; and that is an important distinction, as we shall see. *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873), likewise involved dismissal of the nondiverse parties by the trial court. The distinction is express in some cases, such as *Levering & Garrigues Co. v. Morrin*, 61 F.2d 115, 121 (2d Cir. 1932), aff'd, 289 U.S. 103 (1933), and there is nothing in either *Carneal* or *Horn* (decisions whose authority we accept absolutely) to suggest that the Court was opining on the powers of appellate courts. Parenthetically, we note that in *Horn* there had in fact been complete diversity from the start. The heirs of John Horn had sued the executor of his estate. One of the heirs was a citizen of the same state as the executor. For reasons entirely unclear—for there appears to have been no dispute among the heirs—the remaining heirs wanted to make this heir (Mrs. McPhail) and her husband defendants, even though the suit was on her behalf as well as theirs and even though they were seeking no relief against the McPhails. To this end the

plaintiffs asked "that McPhail and his wife be made defendants, if they come within the jurisdiction of the court." The McPhails answered the complaint, admitting the truth of all of its allegations. The Court held that the district court's eventual dismissal of these two nondiverse defendants had restored complete diversity. Actually they had been joined in the suit only conditionally, and they were real parties plaintiff, not defendant, and should have been deemed realigned as such. See *City of Dawson v. Columbia Avenue Saving Fund, Etc.*, 197 U.S. 178, 180 (1905); *Fidelity & Deposit Co. v. City of Sheboygan Falls, supra*, 713 F.2d at 1266-68.

Although section 1653 does not apply to this case, our inquiry is not ended. Federal courts possess not only the powers conferred on them by statute but also inherent powers, powers necessary to the courts' effective functioning as courts—for example, the power to punish for contempt, the power to sanction persons who file frivolous pleadings, the power to determine whether there is jurisdiction, the power, in short, to preserve the integrity of the judicial process. See, e.g., *United States v. Hastings*, 461 U.S. 499, 505-06 (1983); *In re Martin-Trigona*, 737 F.2d 1254, 1261 (7th Cir. 1984); *Dunn v. United States Dept. of Agriculture*, 654 F.2d 64, 68 (Ct. Cl. 1981); *United States v. Reagan*, 453 F.2d 165, 172 (6th Cir. 1971). But " 'inherent authority' is not a substitute for a good reason," *Soo Line R.R. v. Escanaba & Lake Superior R.R.*, 840 F.2d 546, 551 (7th Cir. 1988), and the fact that courts have inherent authority to do some things does not empower them to disregard the limitations on their jurisdiction. Since judges are sometimes careless about jurisdiction (and sometimes make mistakes about jurisdiction without being careless), and naturally are reluctant to set at naught what may have been protracted and expensive proceedings (as in this case), one can find cases in which courts, straining at their jurisdictional leashes, have acted in excess of their jurisdiction and have tried to cure the usurpation by amending the pleadings. See, e.g., *Long v. District of Columbia*, 820 F.2d 409, 416-17 (D.C. Cir.

1987); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 n. 3 (9th Cir. 1987); *Othman v. Globe Indemnity Co.*, 759 F.2d 1458, 1463 (9th Cir. 1985); *Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189 (2d Cir. 1984) (per curiam). (There are other cases, but all from the Ninth Circuit; *Long* and *Caspary* are the only cases from other circuits.) Judge Sneed spoke with refreshing candor about these cases when he said in *Continental Airlines* that "conferring jurisdiction retroactively is a curious idea," and "knowledgeable judges have said it cannot be done," but "they underestimated, it appears, judicial—or at least appellate—resolve." 819 F.2d at 1523-24 n. 3. None of the cases in this line relies on section 1653. No court has ever held that the statute empowers an appellate court to add or drop parties. The cases that have exercised an "inherent" power to preserve diversity jurisdiction by dropping a nondiverse party appear to have proceeded on the theory that courts should do what they think needs doing without inquiring too closely into their authority to do it.

The temptation to seize for reasons of trivial expediency a jurisdiction that has not been granted should be resisted, as it was by another panel of the Ninth Circuit in *Rockwell International Credit Group v. United States Aircraft Ins. Group, supra*, decided shortly after *Continental Airlines*: "the proposed amendment is not merely technical like the dismissal of a nonessential nondiverse party. The proposed amendment seeks more than the correction of 'defective allegations of jurisdiction,' a correction permissible under 28 U.S.C. § 1653. The proposed amendment attempts to create jurisdiction where none existed. The proposed amendment is not acceptable." 823 F.2d at 304. The word "nonessential" makes interpretation of this passage difficult. If the word is intended to be synonymous with "nominal," the opinion is consistent with our approach; if it means "nonindispensable," it is inconsistent but makes the passage we have quoted internally contradictory—so the former reading is preferable, though either way the reference to "dismissal of a non-

essential nondiverse party" is dictum, for that was not what was being sought.

The importance of resisting temptation is especially great in cases that are within federal jurisdiction if at all only because the parties are of diverse citizenship. This is a jurisdiction that the Supreme Court has told us should be construed strictly, see *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77 (1941), in recognition of the sensitive issues of comity and federalism that its exercise involves. The Court has also told us that "the age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction." *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988).

It would be remarkable if the federal courts of appeals had a comprehensive power, somehow inherent in their being courts, to confer jurisdiction on district courts retroactively. Suppose an Illinois citizen sues five other Illinois citizens and one Iowan. Could we five years later, after a trial on the merits, grant the plaintiff's motion to dismiss the five nondiverse defendants, in order to preserve its victory on the merits? If during the district court proceedings in this case Mr. Bettison had become a citizen of Texas, could we have backdated his change of address to the date of the complaint, to preserve jurisdiction? If the suit had been for $1,000 but judgment had been entered for $12,000, would the plaintiff have been heard to argue that if it had thought harder when it filed its complaint it would have realized that its claim satisfied the amount in controversy requirement?

The members of this court have tried to impress on each other and on the district judges of this circuit the importance of scrupulous adherence to the jurisdictional limitations of the federal courts. See, e.g., *Kanzelberger v. Kanzelberger*, 782 F.2d 774 (7th Cir. 1986). If we attempt to

patch up the jurisdictional deficiencies in a case when the case comes up to us on appeal, the district courts will have less incentive to police their jurisdiction themselves. They are busy courts, and if they know *we* will clean up jurisdictional messes, we will see little attention to detail by them on questions of jurisdiction. It will seem to them easier to get on with other pressing matters and leave the esoteric jurisdictional points to the court of appeals. That would not be the disciplined regard for the limits of authority that we want to encourage in the courts of this circuit; and by subjecting litigants to proceedings before a judicial body that had no authority to act, it would impose a heavy expense on the public. It is not our office to create a (federal) lawsuit where none exists and in the process create our own authority by overruling our previous decisions.

It may seem, however, that the course of this litigation could not have been affected by the jurisdictional flaw first discovered when the case was appealed. If the plaintiff had known that Bettison's presence as a defendant precluded federal jurisdiction, would it not have refrained from naming him as a defendant? But this is uncertain. The plaintiff's pretrial discovery was directed primarily at Bettison, and it is easier to get certain forms of discovery from a party than from a nonparty. See Fed. R. Civ. P. 33-35. This is not a purely theoretical distinction in the present case. Bettison, and only Bettison, responded to interrogatories and to requests for production of documents—forms of discovery available only against parties. See Fed. R. Civ. P. 33(a), 34(a). Forced to choose between a state court suit with Bettison as a defendant and a federal court suit without Bettison, the plaintiff might have chosen the state court—and who knows what view a state court would have taken of the merits of the case? But all this is beside the point, since the issue is not how severely (if at all) we should punish the plaintiff for having filed a suit that was not within the jurisdiction of the district court, but whether we have the power to determine the appropriate sanction.

Having determined that the district court lacked jurisdiction of this case and that we are powerless to cure this lack, we must decide whether to vacate the judgment with instructions to dismiss the suit or vacate the judgment and remand the case to the district court. We choose the latter course even though neither party has *explicitly* asked us to. The defendants asked us to dismiss the case; the plaintiff asked us to retain the case by dismissing Bettison. But the plaintiff also said that it would "present a similar motion as necessary in the District Court," and implicit in this wording is a request that if this court should decide not to drop Bettison the district court should be given a shot at the question. There was not even an implicit request in *Kanzelberger v. Kanzelberger*, *supra*, where, rather than remand to the district court, we directed that court to dismiss the case.

Rule 21 of the Federal Rules of Civil Procedure provides that "parties may be dropped or added by order of the court . . . at any stage of the action and on such terms as are just." The principle expressed in this rule is a response to the harsh common law rule that required automatic dismissal in the event of misjoinder. See Clark, Handbook of the Law of Code Pleading 352-68 (2d ed. 1947). The relevance of the principle to the question whether a misjoinder affecting jurisdiction is ever curable is apparent, and together with the broad wording of the rule may explain the large number of decisions which hold that Rule 21 (or its predecessors) empowers a district court to dismiss, at any stage of the proceedings, a party whose presence destroys complete diversity, if such dismissal is necessary to preserve diversity jurisdiction and would not harm other parties. *Horn v. Lockhart*, as noted, was one such case (and *Carneal v. Banks* may have been another). Other cases in this line include—and this is a small sample—*Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 19 n. 18 (1951); *Fritz v. American Home Shield Corp.*, 751 F.2d 1152, 1155 (11th Cir. 1985); *Park v. Didden*, 695 F.2d 626, 631 (D.C. Cir. 1982); *Publicker Indus-*

tries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1069 (3d Cir. 1979); *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 692 (4th Cir. 1978); *Dollar S.S. Lines, Inc. v. Merz, supra*. This court first embraced the principle in 1897, see *Mason v. Dullagham*, 82 Fed. 689 (7th Cir. 1897), and it is mentioned with approval in both *Alderman v. Elgin, Joliet & Eastern Ry., supra*, 125 F.2d at 973, and *Carson v. Allied News Co., supra*, 511 F.2d at 24.

Judge Mack, whose opinion in *Dollar S.S. Lines* remains the fullest statement of the principle, pointed out that where a case is remanded to enable the district court to exercise its powers under Rule 21, the court of appeals should not express a view of the merits. See 68 F.2d at 597. For by doing so it may be handing the plaintiff an unearned tactical advantage when the plaintiff comes to decide whether to refile the case in a state court or to ask the district court to retain the case. This point provides a practical reason for the lodging of the power in question in the district courts rather than in the courts of appeals: we are spared the temptation that would be created if we had to decide whether to exercise our discretion to retain a case in the knowledge that if we did so this would allow us to decide the merits, ordinarily with finality.

Most important, the district court is better placed than the court of appeals to determine whether any party was harmed by the presence of the party that destroyed jurisdiction. In their petition for rehearing the defendants took sharp issue with the confident observation in the panel opinion that Bettison's presence in the district court had not affected the conduct of the litigation. They said that Bettison had "had a substantial impact on the posture of the case," that "virtually the sole basis for the district court's determination of liability was from the testimony of Mr. Bettison and from documents that Mr. Bettison produced," and that "none of the other guarantors had access to such materials and no other person was deposed in this litigation. In short, without Bettison, NGI [the

plaintiff] had little prospect of proving its case. Guarantors were therefore clearly affected to their detriment by Mr. Bettison's presence and NGI profited enormously." These allegations may or may not be true, a question on which we express no opinion; the district court is in a better position than this court to evaluate them—indeed, that is our point.

It could be argued that the principle which allows the district court to preserve jurisdiction by dropping a party at any stage in the lawsuit is in tension with the principle that the existence of federal jurisdiction depends on the facts as they exist when the complaint is filed, and not on later events. And it could be pointed out that Rule 21 must be read in light of Rule 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts"). See *Kerr v. Compagnie de Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958); *Hill v. Western Electric Co.*, 672 F.2d 381, 398 n. 10 (4th Cir. 1982) (dissenting opinion); cf. *Audi Vision Inc. v. RCA Mfg. Co.*, 136 F.2d 621, 624 (2d Cir. 1943). But as law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities. If an easily curable jurisdictional defect is discovered shortly after a case is filed, the district court should have the power to decide whether the plaintiff must be put to the bother of filing a fresh suit rather than allowed simply to amend the complaint. See *Hackner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (2d Cir. 1941) (Clark, J.); cf. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 366 (1969). And if this point is conceded it becomes a matter of judgment when the curative power of the district court runs out. Rule 21 specifies no deadline.

None of the parties has asked us to reconsider the interpretation of Rule 21 under which the district court could have done—and, more to the point, still can do—what the plaintiff has asked us to do. This is not surprising. So many cases have adopted that interpretation that a court at our level probably can no longer reexamine it.

Stare decisis has its claims, as much in interpreting Rule 21 as in interpreting section 1653. Stability is an important value in law, and is promoted by declining to revisit issues that have long been settled. Modesty alone would counsel hesitation in setting one's personal view against a view that had over a period of many years commanded the unanimous support of judges of diverse background.

And certainly this appeal is not the right time and place in which to reconsider the scope of Rule 21. The district court has not yet been asked to retain jurisdiction by dismissing Bettison, and if upon being asked the district court decides in a proper exercise of its discretion to do nothing the question of its power will be moot.

We would need a crystal ball to forecast the fate of this litigation on remand to the district court. It may turn out that, rather than do without Bettison as a defendant, the plaintiff would prefer to start over in state court, as it can do without encountering the bar of the statute of limitations. See Ill. Rev. Stat. ch. 110, ¶ 13-217. If the plaintiff decides that it would prefer to stay in federal court (its current preference), it may ask the district court to dismiss Bettison, but the district court may decide that six years of federal litigation in a suit outside its jurisdiction are enough. Conversely, that court may decide that the plaintiff's jurisdictional error was forgivable; that the plaintiff has been sufficiently punished already (for it has seen the victory it won before the panel snatched from its jaws); that when one considers that the plaintiff's error involves both an esoteric and nonintuitive point of federal jurisdiction and was an oversight by the defendants as well as by the plaintiff, it is not so grave an error as to warrant the sanction of dismissal. Excessive sanctions are as inappropriate as inadequate ones. See, e.g., *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1437 (7th Cir. 1987). So the district court may decide to dismiss Bettison after all, though perhaps on terms different from those proposed in the panel opinion. We express no view on these questions; they are for the district court in the first instance.

Long v. District of Columbia, supra, 820 F.2d at 417, holds that if the district court has the power under Rule 21 to preserve diversity jurisdiction by dropping a nondiverse party, we should have the same power. *Long* gave no reason for this conclusion, however, but merely cited two cases. One, *Reed v. Robilio*, 376 F.2d 392, 394 (6th Cir. 1967), makes no reference to Rule 21, and was in any event a case, like *Mullaney v. Anderson, supra*, that involved identifying the real parties in interest—not dropping a real party in interest. The other case cited in *Long* was *Mullaney* itself, which as have noted involved the joining of the real party in interest as an additional named plaintiff. *Mullaney* cited Rule 21 but without discussion of its application at the appellate level, beyond the mysterious statement (342 U.S. at 217) that "Rule 21 will rarely come into play at this [i.e., the Supreme Court] stage of litigation"—mysterious because "the Federal Rules of Civil Procedure, of course, apply only in the federal district courts." *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n. 10 (1965). To this generalization, too, there are exceptions, not only where appellate courts adopt the civil rules to govern proceedings in the appellate court (see, e.g., 9th Cir. R. 1-1), but also where one of those rules clearly constrains appellate action, notably in the case of Rule 52(a), which provides that findings of fact by the district court shall not be set aside unless clearly erroneous. These exceptions have no application to this case. Rule 21 has not been incorporated by reference or otherwise in the Federal Rules of Appellate Procedure or in our circuit rules. Cf. *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1200 (7th Cir. 1987) ("this court has not incorporated Rule 11 into its own rules, and therefore the rule does not apply directly to proceedings in this court"); *Hays v. Sony Corp.*, 847 F.2d 412, 429 (7th Cir. 1988) (same). The result may be an irksome gap in our authority, but there it is.

The *principle* underlying a particular rule may apply to the appellate court independently of the rule itself. The principle behind Fed. R. Civ. P. 12(h)(3)—"Whenever it

appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the case"—requires this court, subject to the district court's curative powers under Rule 21, to order a case dismissed when it notices a lack of subject-matter jurisdiction. See, e.g., *Rice v. Rice Foundation*, 610 F.2d 471, 474 (7th Cir. 1979). Rule 12(h)(3) is an instance of the fundamental principle, which is as applicable to appellate as to trial courts, that objections to subject-matter jurisdiction cannot be waived. See, e.g., *Mansfield, Coldwater & Lake Michigan Ry. v. Swan, supra*. There is no similar overarching principle applicable alike to trial and to appellate courts that authorizes courts to repair jurisdictional defects by changing parties.

Appellate courts are not automatically invested with all the powers of district courts, as the Supreme Court has been at pains to emphasize in discussing factfinding. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985). For us to assume the powers conferred by Rule 21 would be to cross the line that separates our authority from that of the district courts. Our power to act in this suit—to decide the merits, to mete out sanctions, and so forth—depends on a valid final judgment in the district court. If that court was without jurisdiction, it is not for us to create a federal case upon which to exercise our powers.

The line that the Supreme Court has with the consent of Congress drawn in Rule 21 between the powers of the trial and appellate courts of the federal system is not an irrational one. Jurisdictional problems in the district court should be resolved in the first instance by that court, rather than by this court's speculating on how that court might respond to a motion to add or drop parties. Since, moreover, that court has the power, there is no urgent need for this court to confer the same power on itself (even if we could do such a thing), however convenient this might be in a case in which we were utterly confident that a party should be added or dropped to preserve jurisdiction and enable us to reach the merits without

waiting for the district court to decide a motion under Rule 21. And there is such a thing as overconfidence.

Federal judges spend lots of time telling other officials to stay within constitutional and statutory bounds, however those bounds may chafe in particular cases. If we exceed the limits of our own jurisdiction we shall be setting a bad example for litigants in the federal courts and for other persons subject to federal law. We shall be enforcing the lesson that rules on jurisdiction are inconveniences that can be got round by interpreting statutes such as 28 U.S.C. § 1653 expansively and by stretching the elastic concept of inherent judicial authority to the breaking point. We shall also be ignoring the precept (repeated just the other day, in *Kennedy v. Wright*, No. 88-1483, slip op. at 7-8 (7th Cir. July 12, 1988)) that "jurisdictional rules should be as simple as possible." *Coté v. Wadel*, 796 F.2d 981, 983 (7th Cir. 1986). "The first characteristic of a good jurisdictional rule is predictability and uniform application." *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286, 292, modified on other grounds, 768 F.2d 140 (7th Cir. 1985). Cf. *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1722 (1988). The simple rule, which is also the sensible rule and the one established by the weight of precedent, is that, subject to well-defined exceptions that do not include a free-floating discretionary power in this court to cure defects in the jurisdiction of the district courts, jurisdiction is determined on the pleadings as originally filed. If the jurisdictional *allegations* are defective but there was jurisdiction when the complaint was filed, we can cure the defect under section 1653. But if there was no jurisdiction when the complaint was filed the case must be dismissed, subject to the curative powers of the district court under Fed. R. Civ. P. 21.

The judgment is vacated and the case returned to the district court (where it will remain with Judge Shadur pursuant to Circuit Rule 36) for further consideration consistent with this opinion. No costs in this court.

CUDAHY, *Circuit Judge*, concurring:

I agree with the result and with the lion's share of the reasons the majority so ably propounds in reaching it. I also agree, or at least sympathize, with much of the dissent, particularly the outlook of its opening paragraphs decrying the profligate waste of resources involved in jurisdictional errors and their rectification.

Both the majority and the dissent urge the prompt repair of jurisdictional mistakes where feasible and where appropriate, by the court authorized to pursue such measures. If the dismissal of a "spoiler" is necessary to retain jurisdiction, clearly a district court may undertake this remedial task. A court of appeals, however, may not. Section 1653 seems to me to allow appellate courts to permit correction of mistaken pleadings, not to change the configuration of a lawsuit by dropping or adding parties or changing the amount in controversy. This interpretation of section 1653 leaves us without any plausible device for empowering appellate courts to perform the necessary surgery.

I also believe that vesting these powers in the first instance in the district courts is sound policy. Here, for example, the issue is whether Bettison can be dropped without unfair prejudice to the remaining defendants. The district court is inherently better qualified to address this concern—acquainted as it is with all the practical baggage of the ongoing case—than we who must view matters from afar. Further, the district court, in deciding whether, and if so how, to remedy a jurisdictional problem, acts (hopefully) with less of an eye to the merits than we who, by restoring jurisdiction, become entitled to reverse.

I am not overly troubled by the metaphysics of retroactivity in performing jurisdictional surgery. This is particularly true when we are faced with the kind of obscure deficiencies found in the instant case. But I think these operations should be undertaken by the court clearly authorized in the premises and best informed about the practical realities of the case.

EASTERBROOK, *Circuit Judge*, with whom FLAUM and KANNE, *Circuit Judges*, join, dissenting. It takes an average of 12 months to get a case from filing through summary judgment in the Northern District of Illinois. It took this particular case more than four years to yield the partial summary judgment that is the subject of the appeal under Fed. R. Civ. P. 54(b); more remains to be done. It takes another 11.3 months, on average, to resolve an appeal in the Seventh Circuit.[1] During these months lawyers are doing chores and sending bills; clients are stewing, their disputes festering.

Part of the time is attributable to factual and legal complexity, rules that send counsel droning through files in search of something that may turn out to be useful. Part of the time is attributable to procedural entitlements (such as 45 days to file a brief), present even if there were no other cases on the docket. Part of the time is attributable to unnecessary steps ("Your honor, I would like to file a Motion for Delay"). Much of the remaining time is attributable to congestion. The judge cannot turn to one case until done with another—and he does not spend as much time as the case deserves because he knows that there are others in the queue. Delay and the quality of justice are inversely related.

We can do something about these sources of delay, expense, and diminution in the quality of justice. Or we can make the problem worse. Today we make the problem worse. A substantial portion of this complex case has been resolved on the merits by the district court—which wrote four lengthy opinions—and by a panel of this court; the rest has been remanded so that it may be wrapped up at long last. Instead of calling it a day, so that judges can move on to fresh business (or spend more time with

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[1] Director of the Administrative Office of the United States Courts, **Annual Report 1987** Table B4 (appellate figures), Table C-5 (district court figures for cases terminated "during or after pretrial").

cases that need it), we order proceedings that will delay the case by another year or so without altering its outcome.

I

The technical question is whether an appellate court may grant a motion dismissing a party in order to produce complete diversity of citizenship among the remaining litigants. NGI filed, and the panel granted, such a motion. See 832 F.2d 417, 419-20 (7th Cir. 1987). Every court that has considered the question in the last two score years has held that an appellate court may grant such a motion. E.g., *Long v. District of Columbia*, 820 F.2d 409, 416-17 (D.C. Cir. 1987); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 n.3 (9th Cir. 1987); *Orthman v. Globe Indemnity Co.*, 759 F.2d 1458, 1463 (9th Cir. 1985); *Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189, 191-92 (2d Cir. 1984); *Ross v. Electrical Workers*, 634 F.2d 453, 456-57 (9th Cir. 1980); *Fidelity & Casualty Co. v. Reserve Insurance Co.*, 596 F.2d 914, 918 (9th Cir. 1979). Cf. *Reed v. Robilio*, 376 F.2d 392, 394 (6th Cir. 1967) (directing the district court to dismiss a non-diverse party that was not indispensable to the suit, and reaching the merits on the assumption this would be done). See J. Wm. Moore & Jo Desha Lucas, 3A **Moore's Federal Practice** ¶21.03[2] at 21-10 to 21-13 (1986 rev.); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7 **Federal Practice and Procedure** §1688; Wright, Miller & Edward Cooper, 13B *id.* at §3605 pp. 400-03 & §3611 pp. 518-20 (2d ed. 1984), approving the practice. Not one case since 1942 has held that an appellate court is forbidden to do this. Our decision in *Alderman v. Elgin, J. & E. Ry.*, 125 F.2d 972 (7th Cir. 1942), does not give a reason for its contrary conclusion. We are convened en banc and must decide for ourselves whether *Alderman* is right.

But a discussion of appellate practice is the wrong place to start. We cannot decide what powers appellate courts possess without appreciating the authority district courts wield to dismiss parties whose presence prevents diversity jurisdiction from arising. There are three distinct questions. (A) May a district court dismiss a party whose presence spoils jurisdiction?; (B) May an appellate court do what a district court may?; (C) If dismissal is an option, is its exercise prudent? I examine these in turn.

A

Complaints that do not invoke the district courts' subject-matter jurisdiction are regrettably common. A district court may deal with the problem in two principal ways: it may dismiss the case for want of jurisdiction and permit the plaintiff to file a new and sufficient complaint, or it may cure the defect by dismissing the party whose presence spoils jurisdiction. Rule 21 of the Federal Rules of Civil Procedure suggests the latter course, providing:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

District courts frequently use their authority under Rule 21 to get rid of jurisdictional "spoilers", a procedure that has the unanimous approval of students of the subject. E.g., *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979) (a court "may dismiss a nondiverse party in order to achieve diversity even after judgment has been entered"); *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 691-92 (4th Cir. 1978); *Dollar S.S. Lines, Inc. v. Merz*, 68 F.2d 594 (9th Cir. 1934); Wright, Miller & Kane at §1685 (collecting cases); Moore & Lucas at ¶21.03 pp. 21-10 to 21-13 (more cases); cf. ALI, **Study of the Division of Jurisdiction Between State and Federal Courts** 366 (1969) (calling dismissal of a case because of belated discovery of jurisdictional problems a "fetish of federal jurisdiction . . . wholly

inconsistent with sound judicial administration [that] can only serve to diminish respect for a system that tolerates it.").

If the court sees the defect early in the proceedings, it is simple to dismiss the case and await refiling. If the defect lies unrecognized for a substantial period, however, dismissal is a less attractive option. The court may have put substantial time into the case. If it is dismissed and refiled (minus the "spoilers"), another judge will need to duplicate the work—reducing judicial time available to resolve the disputes of innocent litigants in other cases.

True, dismissal penalizes the plaintiff, whose carelessness in naming parties (or in choosing federal court, given the selection of parties) is the cause of the problem. This will make lawyers more careful in future cases. Deterrence is not, however, dismissal's only effect. Dismissal well into the litigation imposes costs indiscriminately—on the plaintiff, on the defendant, on the judicial system, on other litigants waiting in the queue for judicial time. Most of these actors do not deserve to be penalized. Trying to deter legal errors by requiring cases to be relitigated conflicts with the principle that to the maximum extent possible the legal system should employ money sanctions, which do not create deadweight losses and injuries to third parties. Worse, the sanction implicit in requiring dismissal and relitigation rises the longer the case has been pending (and thus the more work must be redone); yet the optimal penalty for careless assertion of jurisdiction does not depend on the amount of time it takes to discover the problem. Quite the contrary, a problem that eludes both counsel and district judge is likely to be esoteric, as in this case.[2] The appropriate penalty

[2] The defect is that Bettison, a U.S. citizen living in Caracas, Venezuela, is "stateless" for purposes of the diversity jurisdiction if Caracas is his domicile. *Sadat v. Mertes*, 615 F.2d 1176, 1182 (7th Cir. 1980). This is a picky jurisdictional point to start with; one might reasonably suppose that a U.S. citizen has to be a citi-

(Footnote continued on following page)

for missing a fine point of federal jurisdiction is lower than the appropriate penalty for missing a basic point. Yet the cost imposed by a penalty of dismissal is likely to be higher the more abstruse the rule, because rare diseases take longer to diagnose. Any penalty for neglect should fall on the lawyers who carelessly invoked federal jurisdiction. It is undesirable to have a sanction felt more widely—burdening clients, judges, and parties in other cases—unless absolutely necessary.

The guarantors say that it is. The case did not come within federal jurisdiction when filed, so they maintain it must be dismissed outright. Any other conclusion, they submit, permits a federal court to "create" jurisdiction—"retroactively" to boot. Whether any given kind of "retroactive" alteration in jurisdiction is proper cannot be settled by the term. Some retroactive jurisdictional effects are common. For example, a claim within the court's pendent jurisdiction may be dismissed when the demise of the federal issue "retroactively" deprives the pendent claim of support. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). A case properly removed to federal court may be remanded when the deletion of the jurisdiction-giving claim "retroactively" makes removal improvident. *Carnegie-Mellon University v. Cohill*, 108 S. Ct. 614, 619-22 (1988). We take jurisdiction of appeals from partial final judgments, even though the partial judgment under Fed. R. Civ. P. 54(b) was not entered until after the notice of appeal had been filed—thereby "retroactive-

[2] *continued*

zen of at least one state or territory, and apparently all parties to the litigation did. Perhaps Bettison is; one may be a domiciliary of a state while living elsewhere, and citizenship for diversity purposes follows domicile. The complaint does not allege Bettison's domestic domicile, however, and therefore does not invoke the mixed alien-diversity jurisdiction of 28 U.S.C. §1332(a)(3), causing the case to flunk the complete-diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). NGI does not now maintain that Bettison is domiciled in any state, so we must assume that the complaint did not establish federal jurisdiction.

ly" creating jurisdiction that was not present at the beginning of the appeal. *Local P-171 v. Thompson Farms Co.*, 642 F.2d 1065, 1073-75 (7th Cir. 1981). Such cases show that a "retroactive" jurisdictional effect is nothing more than taking cognizance of a change in the circumstances and parties before the court. Such a change has occurred in this case. With Bettison gone, jurisdiction lies under §1332(a)(2) because the plaintiff is a citizen of the United States and the four defendants are citizens of Venezuela. When the district court enters a final judgment on remand, it will have subject-matter jurisdiction. From a different perspective, however, Bettison's dismissal produced jurisdiction retroactively because it permits a court to employ as the basis of decision the proceedings that took place while Bettison was present.

Whether this amount of retroactivity is permissible is a question of adjudicatory power. There can be no doubt that Article III of the Constitution supplies the power, if Congress permits the courts to use it. The obstacle to subject-matter jurisdiction is the "complete diversity" rule of *Strawbridge*, which is not part of Article III. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (the "minimal diversity" required in statutory interpleader cases satisfies the Constitution). This suit, with a citizen of Illinois on one side, five aliens (four guarantors plus NGV) and an expatriate on the other, has satisfied the constitutional minimum since the day it was filed. The suit failed to invoke a statutory grant of jurisdiction—the presence of U.S. citizens on both sides made §1332(a)(2) unavailable, and Bettison's statelessness made §1332(a)(3) unavailable—but the effect of a statutory defect is a statutory question.

The cases on which the defendants rely to show that that courts may not create "retroactive jurisdiction" deal with shortfalls of adjudicatory power that Congress either did not or could not do anything about. For example, in *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379 (1884), the Court held that a case had been removed without jurisdiction when "one of the plaintiffs,

and a necessary party, McMann, was a citizen of Ohio, the same State of which the defendants were citizens." *Id.* at 381. The case could not proceed in federal court with McMann, and it could not proceed in any court without him. See also, e.g., *Shields v. Barrow*, 58 U.S. (17 How.) *130 (1854).

Things are otherwise when the non-diverse party is not essential to the litigation. Long before *Swan* the Court held that a district judge may dismiss a dispensable, non-diverse party and get on with the case—presumably "retroactively" validating any acts that had occurred before the dismissal. *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, *187-88 (1825) (Marshall, C.J.); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873). (*Cameron v. McRoberts*, 16 U.S. (3 Wheat.) *591, *593-94 (1818), may be the first in this line, but the report is so cryptic that it is hard to tell what the Court held.) Cf. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) (a court may certify a class even after the original representative plaintiff's case becomes moot, a form of retroactive jurisdiction justified in *Geraghty* by the fact that other members of the class have live claims and a new champion might intervene and carry on the case). The trial court's ability to dismiss a party whose presence destroys jurisdiction—and then to enter a judgment binding the remaining parties, without starting the litigation from scratch—is one of the most venerable jurisdictional principles.

Horn was a contest among the descendants of John Horn seeking larger shares of his property. The administrator and several legatees lived in Alabama; the plaintiffs lived in Texas; some of the people who gained from the administrator's decisions also lived in Texas and were named as defendants. 84 U.S. at 573-74. These Texas defendants were real parties in interest, as the suit would determine their shares in the remaining property of the estate (or any damages the administrator would have to pay). The complaint was defective under *Strawbridge*. No one paid attention to the defect for more than three years, however. The defendants did not bring the problem to the

district court's attention until a few days before it released its opinion—by which time they may have recognized, based on the extensive earlier proceedings, that they were about to lose.[3] The Supreme Court held that it was unnecessary to dismiss the case but would suffice to delete the defendants whose presence destroyed jurisdiction, so long as they were not "indispensable parties", *id.* at 579.

Carneal is similar. The plaintiff sued two groups of legatees, one claiming through Carneal and one through Harvie. The plaintiff had real claims against both groups, but only the Carneal group was diverse from the plaintiff. Chief Justice Marshall held that the district court could dismiss the Harvie group and proceed against the Carneal group "unless it be indispensable to bring Harvie's heirs before the court, in order to enable it to decree against Carneal's heirs." 23 U.S. at *188. *Carneal* and *Horn* show that the Court draws lines between real parties (who may be dismissed to secure jurisdiction) and indispensable parties (whose necessary presence requires the court to dismiss the case). The parties in *Carneal* and *Horn* were anything but nominal; their rights were at stake. Nominal parties' citizenship is immaterial to jurisdiction, *Bacon v. Rives*, 106 U.S. 99 (1882); *Matchett v. Wold*, 818 F.2d 574, 576 (7th Cir. 1987), so there would have been no need to dismiss the non-diverse parties in these cases had they been "nominal". The Court did not hint that the parties had been improperly aligned; as it saw the cases, jurisdiction was missing when the complaints were filed, and was created by dismissing the non-diverse parties. Unless *Horn* and *Carneal* are no longer

[3] The complaint in *Horn* was filed in November 1867, and extensive proceedings were had before the defendants' motion, filed May 26, 1871, to dismiss the whole case for want of jurisdiction. The district court dismissed only the two Texas defendants whose presence spoiled complete diversity, and on June 2, 1871, gave its opinion on the merits. (These details are in the record of the case filed in the Supreme Court.)

authoritative, a district court may dismiss Bettison, the "spoiler" in this case, and reenter its judgment. The Supreme Court has never questioned these cases; their holdings govern still.

The three cases from this court on which the defendants rely—*Illinois v. General Electric Co.*, 683 F.2d 206, 209 (1982); *Denberg v. Railroad Retirement Board*, 696 F.2d 1193, 1197 (1983); *American National Bank & Trust Co. v. Bailey*, 750 F.2d 577 (1984)—do not deal with the deletion of parties. None cites *Carneal*, *Horn*, and similar cases. *General Electric*, the only one of the three in which a rule against "retroactive jurisdiction" determined the outcome, dealt with a defect in subject-matter jurisdiction under Article III. *General Electric* did not present a "case or controversy" when it was filed; we held that a controversy later arising between the parties could not breathe life into a case that was dead on arrival. *Denberg* was a class action filed in the wrong court, and we concluded that the status of the representative plaintiff controlled; that members of the class could have filed in that court would not support jurisdiction when the only named plaintiff could not so file. No such members had appeared to carry on the case as representatives, and the named plaintiff would not be a good representative of a class to which he did not belong. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977). Belated intervention could present independent difficulties under Article III. See *Kremens v. Bartley*, 431 U.S. 119, 130-33 & n.12 (1977). *American National Bank* remarked that belatedly dropping a party to obtain diversity jurisdiction "raise[s] theoretical problems—for how can jurisdiction be obtained retroactively?" (750 F.2d at 585) but dropped the inquiry because, it held, there had been diversity jurisdiction from the beginning. None of these cases holds that Congress may not permit courts to repair, and then disregard, reparable defects in establishing elements of subject-matter jurisdiction with which Congress could dispense altogether.

There is something farcical in dismissing a case after decision on the merits only to have it refiled in the district court and proceed to a foreordained judgment—as this case would, for NGI could name the four Venezuelan guarantors as defendants, submit the discovery materials and obtain the decision to which it is entitled. Illinois, like other states, gives suitors a period of time notwithstanding ordinary statutes of limitations to refile actions that have been dismissed on jurisdictional and other technical grounds. See Ill. Rev. Stat. ch. 110 ¶13-217. To dismiss a case such as this is to impose random burdens on these litigants, the district court, and persons waiting in the queue for judicial attention. *Horn* and like cases permit district courts to avoid such wasteful proceedings.

B

If the district court may secure jurisdiction by dismissing parties—may do this almost four years into the case, as *Horn* holds—is there any reason why appellate courts should lack the same power? Until the last few decades the answer might have been "yes" on the ground that no rule comparable to Fed. R. Civ. P. 21 applied to appellate courts. Congress provided in the 1948 revision of 28 U.S.C. §1653, however, that parties may amend jurisdictional allegations to cure defects even while the case is on appeal. It says:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

This statute equates the powers of the two courts. We know from *Carneal* and *Horn* that district courts may cure defects; we know from §1653 that trial and appellate courts have the same powers; reparable defects in the complaint therefore do not doom the case.

True, §1653 speaks of amending "[d]efective allegations of jurisdiction", leading to the argument that it addresses only the allegations about jurisdiction and not the existence of jurisdiction. Such a reading stresses the "of"—allegations *of* jurisdiction rather than allegations *affecting*

jurisdiction—and limits the statute to rectifying the failure to name a corporation's principal place of business and similar omissions. The difficulty with this reading is that in federal practice there is no significant difference between allegations "of" and allegations "affecting" jurisdiction; the jurisdictional allegations of a complaint do both. See generally *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988). One need think only of the allegation about the amount in controversy. Unless the complaint alleges that the amount exceeds $10,000, it does not establish federal jurisdiction—even if a jury later determines that the damages in fact exceed $10,000. Because the difference between "of" and "affecting" jurisdiction is such a fine line, if it is a line at all, it is appropriate to give §1653 the reading that minimizes the costs of defective pleadings. The language of §1653 does not stand in the way, and it has no pertinent legislative history. It was enacted in 1915, Act of March 3, 1915, 38 Stat. 956, without debate; the recodification and amendment in 1948 did not yield a discussion to fill the gap.[4]

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[4] When enacted, the statute dealt only with jurisdictional allegations pertinent to diversity of citizenship. 28 U.S.C. §399 (1940). The amendment and recodification in 1948 deleted the limit to diversity. Congress also deleted language in the former §399 limiting amendments to cases in which diversity "in fact existed at the time the suit was brought." The entire legislative history in 1948 is:

> Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed.
>
> Changes were made in phraseology.

What the revisers called "phraseology" lies at the heart of this case. For reasons discussed in the text, I do not rely on the unexplained deletion of the phrase quoted, for courts have exercised that power since 1825 without a statutory source.

(Footnote continued on following page)

Some courts have emphasized "allegations of" to reject particular proffered amendments. E.g., *Aetna Casualty & Surety Co. v. Hillman*, 796 F.2d 770, 775-76 (5th Cir. 1986) (§1653 may not be used to add new parties); *Pressroom Unions v. Continental Assurance Co.*, 700 F.2d 889, 893-94 & n.9 (2d Cir. 1983) (same). Some of these cases contain language to the effect that §1653 does not allow a court to "create" jurisdiction. Like any language in judicial opinions, such declarations must be read with reference to the kinds of "creation" the parties proposed. Two of the cases on which my colleagues rely show the danger of looking at loose language rather than the holdings.

In *Field v. Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980), the plaintiff, as administrator of an estate, filed a suit that did not invoke the diversity jurisdiction because the administrator was a citizen of the same state as the defendant, and an administrator's citizenship controls. When the administrator saw the problem, she moved in the district court to substitute a new administrator for the estate. That swap, for the sole purpose of creating jurisdiction, would have been collusive within the mean-

[4] *continued*

Respectable authority supports the view that the 1948 amendments to the judicial code do not change its meaning. *Fourco Glass Co. v. Transmura Corp.*, 353 U.S. 222, 227 (1957). Equally respectable authority supports the opposite view. *Tashire*, 386 U.S. at 532-33 & n.11. In general, a change in language ought to be honored, because it is the text of the statute and not the revisers' notes that Congress enacts into law. *Maine v. Thiboutot*, 448 U.S. 1, 7-8 & n.5 (1980) (giving effect to a change in statutory text even though, as the dissenting opinion pointed out, the revisers and floor managers repeatedly assured Congress that nothing was being changed). The presumption of no change stated in *Fourco* is not a warrant for disregarding real changes in the text. Section 1653 was not simply changed in 1948; it was rewritten, and the revisers' notes informed Congress that at least one substantive change had been accomplished. To the extent text and revisers' notes conflict about the existence of further changes—they do not, for "changes in phraseology" covers a multitude of sins—the text wins.

ing of 28 U.S.C. §1359. The district court said no; the court of appeals affirmed. As well it should, for §1653 does not authorize a court of appeals to grant a motion seeking an unlawful dispensation. In *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 512 (5th Cir. 1985), the plaintiffs wanted to amend the complaint, on appeal, "to substitute new causes of action" (759 F.2d at 512) that would have supported federal-question jurisdiction—more accurately, to resurrect four federal claims that the plaintiffs voluntarily dismissed before trial. Well of course the court said no; the motion proposed to revamp the law suit, requiring it to be restarted.

Courts that do not allow §1653 to be used to change the face of a lawsuit on appeal also permit dropping a single party. Frequently they do not discuss their authority to do this; neither when dropping parties in some cases nor when asserting in others that §1653 does not allow the "creation" of jurisdiction do these courts reason their way to a conclusion. *Fidelity* cites §1653 and Rule 21 indiscriminately when dropping a party; other cases cite nothing at all; the cases that construe §1653 strictly do not cite the cases (often in the same circuit) that permit the deletion of parties to produce jurisdiction. The back-and-forth one can find in the reports does not suggest that the subject has brought out the best from those who have written about it. There is nonetheless a sensible difference between dropping and adding parties that brings both lines of cases out right. An additional party raises problems of service, the period of limitations, even (potentially) of proving the allegations about citizenship; the extra party may have a legitimate protest; dropping a party poses none of these difficulties. Appellate courts freely permit plaintiffs to drop claims for relief, although they do not allow the addition of claims. What is true for claims is true for parties. In both *Aetna* and *Pressroom Unions* the addition of a party potentially changed substantive rights (new sources of liability, etc.); in *Aetna* even the new party would not have solved the jurisdictional problem (because it was not the real party in interest, see

796 F.2d at 775). Not a single case since 1942 denies that appellate courts have the *authority* to permit the amendment of a complaint to drop one or more parties; the deletion of a party changes a jurisdictional "allegation" in a complaint and so is authorized by a natural reading of the statute;[5] whether it is wise in any case to use that authority is a separate question, which I address in Part C below.

Section 1653 could be read the way the majority reads it. It is ambiguous, no doubt. Yet it is no more opaque than Rule 21, which all agree permits district courts to drop parties to secure complete diversity. Rule 21 says that parties may be "dropped or added" but does not say under what circumstances or mention jurisdictional consequences. Why read the Rule to allow deletions with jurisdictional effects, and the statute, which mentions jurisdiction, to exclude such a possibility? The way the majority reads §1653, the reference to "*trial or* appellate" courts is pointless; trial courts always have had the power to allow amendments such as the allegation of a corpora-

[5] The majority cites *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302 (9th Cir. 1987), slip op. 10-11, as a case in which a court "resisted" the "temptation to seize for reasons of trivial expediency a jurisdiction that has not been granted". One might think, by its placement immediately after a group of cases holding that an appellate court may grant a motion to dismiss a non-essential non-diverse party, that *Rockwell* disagrees with these cases. Not so. *Rockwell* states, 823 F.2d at 304, that an appellate court *may* permit "the dismissal of a nonessential nondiverse party"—exactly the proposition the panel accepted. *Rockwell* then holds that the case at hand *was not of that type* because the sole named defendant was an unincorporated association, so it was impossible to produce jurisdiction by dismissing some of its members—all of which were indispensable under Rule 19, yet none of which had been named in the complaint. The remand in *Rockwell* was to consider sanctions under Rule 11, not to consider the dismissal of parties. No one doubts that if it is impossible to create diversity by dismissing a party, an appellate court may not do so—because no one may. Such a holding does not advance the majority's argument.

tion's principal place of business—the only function my colleagues grant to §1653 in either court. The way I read §1653, the reference to trial courts has a real function—to provide a statutory source for the power to dismiss parties in order to secure diversity jurisdiction, a function that Rule 21 serves poorly if at all. (The majority pointedly observes, slip op. 15, that Rule 21 is ill-suited to this function, given the adjuration in Rule 82 against treating the civil rules as affecting jurisdiction; no such obstacle confronts §1653.)

Anyway, Rule 21 has never been necessary to the district court's power. The Supreme Court recognized that power more than a century before there was a Rule 21; why should appellate courts be different, now that §1653 treats the two tribunals identically? If this smacks of "inherent powers" so be it, but I mean no such claim. An "inherent" or "supervisory" or plain vanilla common law power is an essential underpinning of an order compelling someone to do something he would rather not. If a court should direct the plaintiff to dismiss a party to perfect its jurisdiction, it would need a source of authority (inherent or otherwise). But the plaintiff is master of its complaint. If the plaintiff wants to drop all claims against a defendant, why look for judicial powers? The question is: "What's to prevent it?" The plaintiff amends its complaint and that's that. A court might deny leave to amend or attach conditions—such acts require authority. We routinely allow (nay, encourage) parties to drop legal theories or whole claims on appeal, without suggesting that the party needs our approval or that we have overstepped the powers of appellate courts. NGI dropped a defendant rather than a claim, and it took no special authority to allow that deletion to have its natural jurisdictional consequence. What's to prevent it?

Let us return, however, to §1653, the repository of the statutory powers of **both** district and appellate courts, if such powers be needed. *Thomas v. Anderson*, 223 F. 41 (8th Cir. 1915), is the only case holding that §1653 may

not be used to dismiss a party on appeal.[6] *Thomas* relied on *Denny v. Pironi*, 141 U.S. 121 (1891), and *New Orleans v. Winter*, 14 U.S. (1 Wheat.) *91 (1815). These cases mean, the Eighth Circuit thought, that "the cure, if there can be one, must be had in the court of original cognizance, not in the appellate court." 223 F. at 43. Yet a cure in the district court would be as "retroactive" as a cure in the appellate court; it would just be more time-consuming. *Thomas* did not deal with the language of §1653 (allegations may be amended "in the trial or appellate courts."); obviously *Winter* and *Denny* have nothing to do with that statute, not enacted until two months before *Thomas* was released.

The plaintiffs in *Winter* sued on an obligation represented to be joint; one of the plaintiffs was a citizen of a territory, and therefore "stateless" under statutes then in force. This spoiled complete diversity. After invoking *Strawbridge* Chief Justice Marshall continued: "[H]aving elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite." 14 U.S. at *95. The defect, as the Court saw it, was not reparable anywhere. (*Winter* predates *Carneal* and *Cameron*, which may explain why the Court did not permit inquiry into whether the obligation was several rather than joint, which would have permitted the dismissal of the "spoiler".)

Denny involved a classically defective allegation: the complaint alleged the plaintiffs to be "residents" rather than "citizens" of California. After losing, the defendant flagged the problem; the plaintiffs remitted $5 of their judgment by a document portraying them as citizens of California. The Court held this remittitur insufficient

[6] *Levering & Garrigues Co. v. Morrin*, 61 F.2d 115, 121 (2d Cir. 1932), aff'd on other grounds, 289 U.S. 103 (1933), relies on *Thomas* and notes §1653 in passing, remarking that it does not avail "for it does not appear that in fact the necessary diversity existed." This is a reference to language in the former version of §1653 that was deleted in 1948. See note 4 above.

because the defendant did not have an opportunity to contest its assertions. It remanded so that the plaintiffs could make the jurisdictional allegation in form capable of contravention. Along the way it remarked: "A case cannot be amended here so as to show jurisdiction, but the court below, in its discretion, may allow it to be done", 141 U.S. at 124. This was dictum, for the plaintiffs had not attempted to amend any allegation in the Supreme Court, and it played no role in the Court's rationale (which dealt with the defendant's inability to contest the allegation). It had some support, however, for in *Continental Insurance Co. v. Rhoads*, 119 U.S. 237 (1886), the plaintiffs had tried to amend their jurisdictional allegations in the Supreme Court. The Court replied, without giving a reason: "If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact, but the court below may, in its discretion, allow it to be done when the case gets back." *Id.* at 240. *Rhoads* does not suggest that anything in Article III requires this apportionment of functions between trial and appellate courts, which Congress eliminated by enacting §1653.

In more recent years, the Supreme Court has allowed jurisdictional repair work in its halls—has allowed, indeed, repair work more extensive than that in this case. In *Mullaney v. Anderson*, 342 U.S. 415 (1952), the defendants questioned the plaintiffs' standing, and thus the existence of a case or controversy under Article III. To avoid the problem, the Court permitted two new plaintiffs to intervene after the court of appeals had decided the case. If the original plaintiffs lacked standing, the intervention produced "retroactive jurisdiction" of the most striking kind. But Justice Frankfurter wrote for the Court, *id.* at 417:

> Rule 21 of the Federal Rules of Civil Procedure authorizes the addition of parties "by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." . . . To grant the motion merely puts . . . the real party in interest [in the case]. The addition of these

> two parties plaintiff can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below.

These new parties were essential, on the Court's assumptions, to the existence (more accurately, to the creation in the Supreme Court) of a justiciable case. My colleagues treat this as a trivial change: "It was as if the complaint had mistakenly named the lawyer rather than the client as the plaintiff." Slip op. 8. Yet a complaint naming only the lawyer would not invoke any statutory grant of jurisdiction; under Art. III no statute could confer such jurisdiction. So the jurisdictional flaw in *Mullaney* was more serious than the one here. The alteration was "technical" (slip op. 10) only in the sense that the dismissal of Bettison is—afterward, the case was within federal jurisdiction and could be decided on the merits without a need to supplement the record or hold further argument. See also *Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969) (relying on §1653 to permit a party to amend a jurisdictional allegation after removing a case from state court, despite the removal statute's requirement that the petition for removal show federal jurisdiction); *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (permitting intervention of new plaintiffs in the Supreme Court to preserve an Article III controversy); Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, **Supreme Court Practice** 340-42 (6th ed. 1986). Whatever lessons *Winter*, *Denny*, and *Rhoads* once taught about roles of trial versus appellate courts, there is a new text.

The majority's argument that allegations "of" jurisdiction in §1653 means something different from allegations "affecting" jurisdiction is a plausible, though unconvincing, interpretation of the text. Two other lines of argument have nothing to do with §1653. One, which weaves through several portions of my colleagues' effort, is that a federal court may not act in excess of its jurisdiction. True but irrelevant. This court has jurisdiction on appeal from a judgment made final under Rule 54(b). At the time the appeal was filed, the complaint did not establish subject-matter jurisdiction. If Bettison should be dismissed, the complaint would establish jurisdiction. The majority reluctantly concludes that a district court may grant a motion dismissing Bettison. If a district court may do this, there is no jurisdictional bar to our doing so; the two courts are identically situated. There may be reasons why we may (or ought) not act on NGI's motion, but these have nothing to do with *our* jurisdiction. The second argument, slip op. 19, is that jurisdictional rules should be clear and simple. Anyone who looks up the majority's citations will learn that I am the last to disagree. This is irrelevant to our problem, though. The majority favors the rule "A district court may dismiss a party to secure diversity jurisdiction but an appellate court may not", while I favor the rule "Both district and appellate courts may dismiss a party to secure diversity jurisdiction". Whatever else may be said for or against these rules, they are equally clear and simple.

Whether an appellate court may do what the district court may do has nothing to do with "retroactive jurisdiction", with "nominal" versus "real" parties, with "technical" versus "substantive" changes, with the need for clear rules, or with inducing parties to pay more attention to jurisdictional elements of their cases. It has to do with the allocation of functions among judges, which affects whether there is to be duplicative effort. At the time *Rhoads* was decided, jurisdictional allegations, like pleadings in general, could be amended only in the district court. This allocation of functions has been abandoned long since. The Rules of Civil Procedure of 1938 give less weight to the timing of amendment; the pleadings are amended to conform to the course of proceedings (Rule 15(c); cf. Rule 54(c)), although one could say that unless

the plaintiff gets the allegations right the first time the case must be dismissed and refiled. Appellate courts have the same power to accept amended pleadings that district courts have. We try to cut out steps that serve no function, see *Communication Workers v. NLRB*, 784 F.2d 847, 849-50 (7th Cir. 1986), a principle that comes to the fore here. If there is to be a rule against "retroactive jurisdiction", that rule should apply to trial and appellate courts equally. As the Supreme Court has held since 1825, however, district courts may create jurisdiction by dismissing parties, retroactively validating earlier acts. If district courts may do this, so may appellate courts.

C

To say that an appellate court may dismiss a party in order to secure subject-matter jurisdiction is not to say that it ought to. A court should consider carefully whether dismissing one party would produce an unjustified injury to another; we ordered the suit dismissed in *Kanzelberger* because the presence of the non-diverse party had produced a tactical advantage for one side. A court also should consider whether restarting the litigation would be the preferable course either because of its exemplary value or because a fresh consideration would be likely to produce a more accurate resolution. These considerations do not, however, lead to outright dismissal of this case—or, as my colleagues have it, to a narrow reading of §1653.

The four Venezuelan guarantors contend that to do other than dismiss this suit deprives them of due process of law. By naming Bettison as a party, the Venezuelan guarantors contend, NGI was able to depose him, while it would have been confined to interrogatories if he had been a party. This is not accurate. Rule 30(a) of the civil rules permits litigants to take depositions of non-parties. Bettison—the principal manager of both NGV and Venvalvex—would have been a central figure whether or not named as a defendant personally. Bettison's absence from the United States may have required NGI to invoke 28 U.S.C. §1783(a), but

recalcitrance may be a problem with parties as well as non-party witnesses.

The Venezuelan guarantors insisted at oral argument before the full court that if they had known from the start that Bettison was not a party, they might have treated him as a hostile rather than a friendly witness, producing a different record. They did not supply particulars, and it is not apparent what they might have done differently. At all events, the four Venezuelan guarantors got notice that Bettison was a party and could have protected themselves, if this is what they thought best. The complaint invoked §1332(a)(3) as the grant of subject-matter jurisdiction. The defendants could have read §1332(a)(3) and discovered that Bettison's presence in the case was fatal to jurisdiction. They could have insisted on his dismissal at the outset, with whatever advantages and disadvantages that entailed. They did not; instead their answer to the complaint admitted that the district court had subject-matter jurisdiction and denied only the existence of personal jurisdiction.

The Venezuelan guarantors conceded subject-matter jurisdiction not only in the district court but also in this court. Circuit Rule 28(b) requires the appellant's brief to contain a full statement of the district court's subject-matter jurisdiction, with particulars. It concludes:

> The appellee's brief shall state explicitly whether the jurisdictional summary in the appellant's brief is complete and correct. If it is not, the appellee shall provide a complete jurisdictional summary.

This rule is designed to ensure that every party to the litigation checks the facts and law important to subject-matter as well as appellate jurisdiction. The jurisdictional summary in NGI's brief disclosed all the facts necessary to defeat jurisdiction.[7] The defendants' brief recites: "The

[7] It stated, in part: "NGI is an Illinois Corporation with its principal place of business at Addison, DuPage County, Illinois. . . . William L. Bettison is a United States citizen residing in Caracas."

jurisdictional summary contained in the Brief for [NGI] adequately states the bases for the jurisdiction of the trial court". Litigants who repeatedly—in answering the complaint, and in addressing the jurisdictional issue on appeal—fail to detect a flaw are not in a strong position to contend that had they known of the defect they would have handled the case differently. Had they thought a different strategy beneficial, they would have searched more diligently for defects. There is no reason why the judicial system should protect parties in big-stakes commercial litigation who fail to protect themselves.

Another kind of injury might be pertinent here. The guarantors other than Bettison may be injured in fact by Bettison's dismissal: they must pay the $200,000 (plus interest) for the pre-November 1979 sales without Bettison's help, and they are exposed to liability for other sales. I gather from NGI's representations at the first oral argument that Bettison has property in the United States on which NGI may have planned to levy. This is not, however, the sense of prejudice that matters. The guarantors are jointly and severally liable, so none is an indispensable party under Fed. R. Civ. P. 19(b). See *Bio-Analytical Services, Inc. v. Edgewater Hospital, Inc.*, 565 F.2d 450, 452-53 (7th Cir. 1977); *Jett v. Philips & Associates*, 439 F.2d 987, 990 (10th Cir. 1971). NGI could have sued only the four Venezuelan guarantors in the first place, putting them in the same position they occupy once NGI dismisses Bettison. Bettison's presence in the district court did not affect the conduct of the litigation.

To the extent a claim of prejudice presents questions of fact or inference, it would be wise in the ordinary course to remand the case to the district court, which is in the best position to determine whether the presence of the extra party affected the outcome. A remand is neither necessary nor appropriate in this case, however, for two reasons. First, the guarantors have not asked for one. NGI moved in this court to dismiss Bettison as a party; the guarantors opposed that motion but did not ask for a remand or an evidentiary hearing; they did not request an initial decision from the district judge but addressed their arguments wholly to the panel. The guarantors' petition for rehearing en banc also did not suggest that the district court should be invited to resolve the question. The guarantors asked for, and got, our views; they have never suggested that they want anyone else's. We should hold them to the strategy they have chosen. Second, this is a "paper case". Bettison's presence was important only to the extent it made discovery from him easier to conduct. It did not create access to information that otherwise could not have been reached (non-parties may be deposed and required to produce documents at their depositions). Ease in securing information is not the sort of "prejudice" that requires new trials. The determination of prejudice therefore does not depend on the district court's closer perspective on the litigation. (Which may be why the guarantors have not asked for a remand.)

If remanding cases of this character were likely to make parties and judges more careful, and so diminish the number of flaws needing correction in the future, then remand would be *de rigueur*. Unfortunately, remands will not have this effect. Consider why parties are likely to take care. If one defendant both spoils jurisdiction and causes prejudice to the remaining parties, the best safeguard is *other defendants'* alertness. The aggrieved party will flag the problem in order to protect its own interests. If we throw cases such as this one back, defendants will take less care, because they can count on district judges to protect them whether they look out after their own interests or not. Would either the plaintiff or the district judge take more care to make up for this shortfall? Unlikely. Since the case may be refiled, the plaintiff has little to lose. The losers are the parties in *other* cases, who must wait longer for judicial attention. They cannot protect themselves from time-wasting steps in strangers' litigation. Would the district judge take more care? That too is unlikely, for he can grant the motion dismissing the spoiler and reenter the judgment. The kind of case in which district courts need to take more care is the kind

in which the jurisdictional shortfall cannot be remedied. These waste judicial time utterly. The kind of case we have here, however, is one in which most or all of the time already spent will be salvaged, with the application of some additional time.

In the end, then, my colleagues adopt an approach that will induce defendants to be less cautious without inducing anyone to be more cautious and that will throw good time after bad as the case shambles toward the same outcome it has already received. I try to be as vigilant as any other judge in throwing out of the federal courts cases that do not belong here; I'm delighted to see that so many others on the court agree with this approach; but with Bettison gone, this case *does* belong here, and we should have as few wasted steps as possible on the route to a final disposition of a case that is properly in federal court.

II

What will happen on remand? Two things are most probable. One: The district judge might agree with the panel of this court that NGI is entitled to amend its complaint to dismiss Bettison as a party. If that happens, the district court will reenter its judgment, NGI will file another appeal, the case will be briefed anew, and about a year later we will decide that NGI is entitled to recover on the guaranty, remanding for *still more* proceedings in the district court to quantify the recovery and resolve lingering questions, of which there are several.[8] In the meantime other litigants will be cooling their heels. Two: The district judge might agree with the four Venezuelan guarantors that they suffered some "prejudice" as a result of Bettison's presence in the case, and if so the court will dismiss the case. About 10 minutes

[8] This is what the panel held, and the defendants did not argue in their petition for rehearing that the panel misunderstood Illinois law.

later, NGI will refile the case under the citizen-alien jurisdiction provided by 28 U.S.C. §1332(a)(2), naming as defendants the original set except for Bettison. NGI will tender all of the discovery materials and move for summary judgment. The discovered information is admissible in evidence. All of the discovery in this case was voluntary; there is no erroneous ruling by the district judge to be set aside; and voluntary discovery may not be undone on the ground that if one party had it to do over, he would have been obstreperous instead of accommodating. With luck the case will be assigned to Judge Shadur, who promptly will renew his rulings—following which NGI will appeal, leading to the inevitable remand from this court. But there are 21 active judges in the Northern District of Illinois, so there is less than a 5% chance that Judge Shadur will get the new complaint. If he does not (and if the Executive Committee does not transfer it to him), some unlucky district judge must slog through this record and make a fresh decision, following which the loser will appeal, and so on. The final disposition will be the same—but the parties' legal bills will be higher, and judges' time will have been diverted from the needs of other litigants, who must suffer the fallout of a problem not of their making. The right word for all of this would be featherbedding, if judges made plumbers' wages.

Now there are other paths this case could take, with lower probability. Judge Shadur might impose sanctions under Fed. R. Civ. P. 11, because NGI filed the complaint without adequately investigating the jurisdictional issue and the defendants answered without investigating it either. Such awards are appropriate for frivolously invoking federal jurisdiction, but the defect here was so esoteric that even Judge Shadur, a jurisdiction-hound, did not catch it, so it's hard to give counsel a strapping. *FDIC v. Elefant*, 790 F.2d 661, 667 (7th Cir. 1986); cf. *Wojan v. General Motors Corp.*, No. 87-1453 (7th Cir. July 12, 1988), slip op. 10-13 (no sanctions when both sides ignored a jurisdictional problem). But if he should impose sanctions, this would consume a little more time (followed by an inevi-

table appeal), and the case then would take one of the two paths already mapped. Perhaps Judge Shadur would dismiss the case, finding that Bettison's presence prejudiced the other guarantors during discovery, and then the judge who drew the new assignment would exclude the evidence gathered from Bettison. Then even *more* time would go down the rat-hole as counsel painstakingly (and painfully) recompiled all of the same information—time squandered, because I cannot imagine a decent ground for the exclusion. But in the end the evidence would be reduced to possession a second time, and the case would go its way to judgment.

Perhaps, my colleagues speculate, NGI would give up on the district court and move to state court (or Venezuela), where it can reach all defendants. A great many zeroes precede the first significant digit in the probability of this, however. After the panel of our court flagged the jurisdictional problem, NGI had to decide what it wanted to do. NGI had lost the bulk of its case in the district court (although it had won some $200,000 on a portion of the case no longer in dispute). It was guaranteed a new run at the subject in state court, against all defendants, by retaining Bettison as a defendant. NGI instead filed a motion to dismiss Bettison and take its chances on the merits. If it was willing to pursue this suit in federal court without Bettison when all it had to show for itself was a loss, and to abandon any hope of reaching Bettison's assets if it should prevail, what is it going to do now that it has an opinion in its favor on the merits? Go to state court, where things could get worse but are not likely to get better? If this suit is dismissed, it will be refiled in federal court. The only question is just how much time will be lost along the way.

Why?

My colleagues say: Because an appellate court is powerless to grant a motion dismissing a party whose presence spoils jurisdiction. Although the conclusion is want of power, a reading of the court's opinion does not convey

the impression that the majority is acting under legal compulsion. It is going against every decision on point since 1942; and as the majority says when recognizing that district courts may cure jurisdictional defects: "law is an instrument of governance rather than a hymn to intellectual beauty, [so] some consideration must be given to practicalities." Slip op. 15. The majority's disposition is not compelled. One can almost see federal judges licking their chops at the prospect of bouncing out of court a miscreant who named one too many defendants. Gotcha! Maybe the district court will complete the process, evicting NGI, never to darken the federal court's door again. Yet this is a case within federal jurisdiction. True, the complaint failed to invoke a statutory grant when it received a file stamp, but the complaint as amended (by dropping Bettison) comes within §1332(a)(2). This case, in the judgment of Congress, belongs in federal court. It is likely to stay in federal court. The only serious question is how much more legal time it will chew up before final judgment in federal court. Where you end up often depends on where you start. I start with a belief that Congress has provided for federal jurisdiction in this case and we ought to resolve it on the merits with speed and economy; having resolved it that way, we should stick with the decision.

The only apparent injury is to Bettison, who has participated in this litigation and faces the prospect of a second suit in state court. Had NGI filed this case in the courts of Illinois or Venezuela, or sued Bettison in one court while pursuing the Venezuelan guarantors in another, his liability would have been finally determined in a single litigation. NGI's carelessness about federal jurisdiction is responsible for this problem, which the panel dealt with by conditioning the grant of NGI's motion on terminating with prejudice the litigation against Bettison. To the extent NGI was counting on reaching Bettison's assets to satisfy any judgment, his dismissal is a significant penalty for NGI's assertion of federal jurisdiction. My colleagues' approach, by contrast, penalizes the federal judiciary and litigants in unrelated cases for the jurisdic-

tional problems that have arisen in this one, and it rewards defendants who have not looked after their own interests. Penalizing the innocent to protect the indolent is not the highest calling of a mature judicial system.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1195

NEWMAN-GREEN, INC.,

Plaintiff-Appellant,

v.

ALEJANDRO ALFONZO-LARRAIN R., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 7933—**Milton I. Shadur**, *Judge*.

ARGUED SEPTEMBER 14, 1987—DECIDED OCTOBER 28, 1987

Before FLAUM, EASTERBROOK, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Newman-Green, Inc., a manufacturer of aerosol valves, licensed Newman-Green de Venezuela (NGV) to use its trademarks and trade secrets in Venezuela in exchange for a 5% royalty on net sales. Newman-Green (NGI) owns 25% of NGV's stock; four Venezuelans and one U.S. citizen living in Caracas own the rest. Several of these are the principal managers of NGV. The five signed a guaranty, the core of which provides:

> In consideration for the execution of the license agreement dated June 13, 1974 from [NGI] to [NGV], the undersigned personally, individually and/or collectively agree that they guarantee the payment to [NGI] of an amount of money up to the 5% royalty set forth in the license agreement and for the period of time specified in the license agreement.

NGV made and sold valves using NGI's technology between 1975 and 1980 but has not paid NGI a penny. One reason was a decision by an agency of the Venezuelan government that 5% was excessive. The license allowed NGI to call off the deal in such an event, and the guaranty was a hedge against the possibility that Venezuela might not approve the license.

When NGI gave notice of termination in light of the decree, NGV made and sold the valves for more than eight months beyond the time allowed by the contract. When NGV stopped, a new firm, Venvalvex, started making valves. NGI believes (with some evidentiary support) that the guarantors organized Venvalvex and transferred NGI's technology to it; we must assume that NGI could prove this at a trial.

NGI is an Illinois corporation, and the guarantors consented to suit in Illinois (and under its law). NGI filed this action against NGV and the five guarantors, relying on the mixed alien-diversity jurisdiction established by 28 U.S.C. §1332(a)(3). The suit has many separate claims for relief, some of which are before us on a separate judgment under Fed. R. Civ. P. 54(b). The district court wrapped up all segments of the litigation involving the guarantors and properly entered the judgment under the "separate party" provision of Rule 54(b).

NGI received summary judgment against the guarantors for the more than $200,000 in royalties NGV owed through November 1, 1979, the final termination date

NGI fixed.[1] The guarantors won summary judgment on two other claims: for royalties on sales NGV made until July 1980, when it became quiescent, and for royalties on Venvalvex's sales since then. The district court held that the guarantors stand behind NGV's debts, not Venvalvex's; and of NGV's debts, the guarantors are responsible only for "royalties". The district court concluded that sums due for valves sold after November 1 are "damages" rather than "royalties" and therefore are not covered by the guaranty. The guarantors have not appealed from the judgment representing royalties through November 1, 1979, and NGI has not appealed from the dismissal of certain claims against NGV itself. (The district court concluded that it lacked personal jurisdiction over NGV with respect to tort claims.) So we need consider only the award of summary judgment against NGI's claims for compensation from the guarantors on sales of valves after November 1, 1979.

I

The guarantors simplified the case further by conceding at oral argument that if Venvalvex is the alter ego of NGV, a mere continuation of that firm's business after squeezing out NGI, then their liability on the Venvalvex sales stands or falls with their liability on the sales between November 1979 and July 1980. The concession was well advised in light of *United States Shoe Corp. v. Hackett*, 793 F.2d 161 (7th Cir. 1986), which, although decided under Wisconsin law, states principles of more general applicability. If Venvalvex is a genuinely new firm, deriving its technology from an independent source, then as the district court correctly held the guarantors

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[1] We need not recount the skirmishing about conversion between Venezuelan bolivares and U.S. dollars that occupied much of the district court's time. See 612 F. Supp. 1434 (N.D. Ill. 1985). Some earlier opinions appear at 605 F. Supp. 793 (1985) and 590 F. Supp. 1083 (1984).

are not liable, even if they are its managers and principal investors. The guarantors' participation in an independent venture might be tortious, but the guaranty does not cover torts. The case was resolved on summary judgment, yet it is a question of fact whether Venvalvex is a "successor" to NGV. If Venvalvex is NGV's successor, it stands in NGV's shoes, and the guarantors—alleged to have arranged the substitution of Venvalvex for NGV—could not improve their position by shuffling corporate papers. The successorship question must be tried, *if* the guarantors are liable for NGV's sales after November 1, 1979.

II

There is an obstacle to reaching this issue, however: subject matter jurisdiction. We haven't any. NGI sued NGV and four Venezuelans. Jurisdiction for a suit between a U.S. citizen and aliens is available under 28 U.S.C. §1332(a)(2). But NGI also sued William L. Bettison, the fifth guarantor. The complaint alleges, and the parties agree, that Bettison is a citizen of the United States who has lived in Caracas for more than a decade; it is a fair inference that Bettison is domiciled in Caracas, and no one contends that Bettison is domiciled in any state. NGI therefore invoked 28 U.S.C. §1332(a)(3), which supplies jurisdiction of suits among "citizens of different States and in which citizens or subjects of a foreign state are additional parties". The difficulty is that Bettison, an expatriate, is not a "citizen" of any state; one must be domiciled in a state to be its citizen. So far as the diversity jurisdiction is concerned, Bettison is "stateless". *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980). He also is not an alien. So §1332(a)(3) does not afford jurisdiction, and there is no other source. See Charles Alan Wright, Arthur Miller & Edward Cooper, 13B *Federal Practice and Procedure* §3621 (2d ed. 1984). Cf. David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 9-10 (1968) (suggesting that Congress do something about the problem, perhaps treating expatriates as foreign nationals). The "complete diversity" rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), requires us to dismiss the whole case.

Unless NGI cures the problem by dismissing Bettison as a party. We invited such a solution, and NGI has filed the necessary motion. See 28 U.S.C. §1653; Fed. R. Civ. P. 21. A court "may dismiss a nondiverse party in order to achieve diversity even after judgment has been entered." *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979). See also, e.g., *Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189, 191-92 (2d Cir. 1984); J. Wm. Moore & Jo Desha Lucas, 3A *Moore's Federal Practice* ¶21.03[2] at 21-10 (1986 rev.).

The guarantors oppose the motion, citing *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 778-79 (7th Cir. 1986). We held in *Kanzelberger* that a plaintiff could not drop a party on appeal to preserve jurisdiction, when that party's presence in the district court conferred a tactical advantage that may have contributed to the judgment. A court ought not allow a dismissal that injures adverse parties unduly, compared with the position the plaintiff could have achieved by suing the right parties in the first place. The guarantors other than Bettison may be injured in fact by Bettison's dismissal: they must pay the $200,000 (plus interest) for the pre-November 1979 sales without Bettison's help, and they are exposed to liability for other sales. We gather from NGI's representations at oral argument that Bettison has property in the United States on which NGI may have planned to levy. This is not, however, the sense of prejudice that matters. The guarantors are jointly and severally liable, so none is an indispensable party under Fed. R. Civ. P. 19(b). See *Bio-Analytical Services, Inc. v. Edgewater Hospital, Inc.*, 565 F.2d 450, 452-53 (7th Cir. 1977); *Jett v. Philips & Associates*, 439 F.2d 987, 996 (10th Cir. 1971). NGI could have sued only the four Venezuelan guarantors in the first place, putting them in the same position they will occupy once NGI dismisses Bettison. Bettison's presence in the district court did not affect the conduct of the litigation.

The only apparent prejudice is to Bettison, who has participated in this litigation and faces the prospect of a second suit in state court. Had NGI filed this case in the courts of Illinois or Venezuela, or sued Bettison in one court while pursuing the Venezuelan guarantors in another, his liability would have been finally determined in a single litigation. NGI's carelessness about federal jurisdiction is responsible for this problem, so although we grant NGI's motion to dismiss Bettison, we dismiss him with prejudice. The other guarantors may pursue Bettison to obtain contribution or indemnity, if they are entitled to any. Section 1653 provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Those are our terms.

III

The district court absolved the guarantors of liability for valves sold after November 1, 1979, because the guaranty covered "royalties" but not "damages"; sums due because of NGV's breach of contract are damages, the district court held. The guaranty is not expressly so limited. It speaks of "a sum of money up to the 5% royalty", and NGI says that this language—designed to sidestep Venezuelan rules that could curtail the payment of "royalties"—also sidesteps the recharacterization of the money as "damages". This is a plausible argument, but we do not reach it. We may assume, with the district court, that ambiguities in the guaranty should be resolved in the guarantors' favor.[2] *Telegraph Savings & Loan*

[2] This hoary maxim is not simply a rule of preference for obligors. Guaranties are important commercial instruments, whose utility would be seriously undermined if, as some language in the district court's opinion suggests, courts should go out of their way to find reasons to absolve guarantors. See *First Wisconsin Financial Corp. v. Yamaguchi*, 812 F.2d 370, 373 (7th Cir. 1987). The rule of construction nonetheless has some function. It gives parties a ready way to choose among degrees of commitment. By posting

(Footnote continued on following page)

Ass'n v. Guaranty Bank & Trust Co., 67 Ill. App. 3d 790, 794, 385 N.E.2d 97, 100 (1st Dist. 1979). This does not matter if the sums are called "royalties", as we think Illinois law requires.

"Royalties" is the term conventionally applied to periodic or sale-based payments for the use of intellectual property. Intellectual property may be used with or without consent. If NGV and the guarantors had stolen the plans for aerosol valves from NGI's offices, they would be liable in "damages", perhaps punitive damages plus compensatory damages equal to their profits or, alternatively, measured by reasonable royalties. *Goldberg v. Medtronics, Inc.*, 686 F.2d 1219, 1228-29 (7th Cir. 1982) (Illinois law). But NGV did not steal the plans. It simply used the technology longer than it was supposed to. Illinois courts have repeatedly characterized payments by the licensees in such circumstances as "royalties". E.g., *Warth v. Loewenstein & Sons*, 219 Ill. 222, 223-24, 76 N.E. 379, 380 (1905) (affirming without comment a requirement that the licensee pay "royalties" after termination until it returned the patented machinery); *Laff v. John O. Butler Co.*, 64 Ill. App. 3d 603, 617, 381 N.E.2d 423, 432-33 (1st Dist. 1978). The parties, who agreed that their deal would be interpreted under Illinois law, must take its characterization of royalties with the other applicable rules. We have used the same terminology, calling the payments by an overstaying licensee "royalties". E.g., *Beckman Instruments, Inc. v. Technical Development Corp.*, 730 F.2d 1076, 1079 (7th Cir. 1984) (dictum); *Kraly v. National Distillers & Chemical Corp.*, 502 F.2d 1366, 1372 (7th Cir.

[2] *continued*

a letter of credit or a bond, the parties may make the obligation almost iron-clad; by obtaining insurance they may choose a middle ground; and by writing a guaranty they select the least security of the corporation's debt. Standby letters of credit are common in transactions of the sort in which NGI and NGV engaged. NGI did not obtain a letter of credit and cannot now demand the degree of certainty a letter would have provided.

1974); *Heath v. A.B. Dick Co.*, 253 F.2d 30, 34-35 (7th Cir. 1958). On the reasoning of these cases, the contractual obligation to pay "royalties" survives as long as the licensee uses the intellectual property.[3]

This usage makes sense, in general and as applied to a case like ours. Licensees of intellectual property have substantial control over compliance with their obligations. The intellectual property is intangible; the owner can't drop by and scoop it up. The opportunity to use the knowledge without paying is inviting, the gains great, detection difficult. If the very fact of opportunistic conduct also cut off an important remedy of the licensor, it would be harder to engage in licensing and everyone would lose.

This case offers an illustration. We must assume, given the posture of the litigation, that the guarantors had operational control of NGV and decided to go on making and selling the valves after the termination date. It would be extraordinary if the guaranty allowed their conduct as corporate managers to extinguish their liability as guarantors. Only a fool would negotiate for such a result, and we do not perceive NGI as dense. The license agreement allowed either side to terminate in certain circumstances. The guarantors' position implies that if they had caused NGV to send NGI a notice of termination, and thereafter had gone on making and selling valves, they would have eliminated their exposure under the guaranty. That cannot be right. Courts try to understand and interpret loose language in contracts (including guaranties) so that it means what the parties would have provided if they had

[3] But for the license agreement, Illinois might cut off NGV's obligation after the period in which it could have engaged in legitimate reverse engineering. *Brunswick Corp. v. Outboard Marine Corp.*, 79 Ill. 2d 475, 404 N.E.2d 205 (1980); cf. *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 683 (7th Cir. 1983) (Illinois law). The guarantors do not say that the license's royalty obligation may be extinguished by the possibility of reverse engineering.

thought about the problem expressly and spelled out their conclusions fully. *Morin Building Products Co. v. Baystone Construction, Inc.*, 717 F.2d 413, 415 (7th Cir. 1983); *Argonaut Insurance Co. v. Town of Cloverdale*, 699 F.2d 417, 420 (7th Cir. 1983); *United Airlines, Inc. v. City of Chicago*, 116 Ill. 2d 311, 318, 507 N.E.2d 858, 861 (1987); Oliver Wendell Holmes, *The Common Law* 303 (1881). We do not suppose for a second that if the guarantors had proposed the clause—"In the event we terminate or breach the license contract we are thereafter not liable under the guaranty contract"—NGI would have done anything but huff out of the room and look for honest trading partners. Yet this parody of a contractual provision is exactly what the guarantors have argued their contract means.

The license and guaranty contracts are consistent with this reading of the obligation to pay "royalties" automatically supplied (as a ready-made term) by Illinois law. Section III of the license provides that all "terms" of the agreement remain in force until 1994 "unless sooner terminated as hereinafter provided." And the termination provisions "hereinafter provided" refer to more than the *notice* of termination; they also require NGV to cease making valves and return the technology, and they set a time limit on the sale of valves from NGV's inventory. These contractual terms survive the giving of the notice of termination. *Illinois Bell Telephone Co. v. Reuben H. Donnelley Corp.*, 595 F. Supp. 1192, 1197 (N.D. Ill. 1984). Cf. *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1196 (7th Cir. 1987) (other obligations in an intellectual property license also survive the notice of termination); *My Pie International, Inc. v. Debould, Inc.*, 687 F.2d 919, 921 (7th Cir. 1982). It is logical to treat the obligation to pay royalties as running with the sale of the valves; only when the termination has been completed (by the cessation of sales and the return of the equipment) does the contractual obligation to pay royalties cease. The guaranty itself requires the guarantors to pay "for the period of time specified in the license agreement". NGI says this means "until 1994 but not beyond"; NGV

says this means "until the notice of termination"; perhaps it could mean "until termination has been completed in accord with the license". If the case turned strictly on the interpretation of these clauses, it probably would require a trial. E.g., *Rivan Die Mold Corp. v. Stewart-Warner Corp.*, 26 Ill. App. 3d 637, 642, 325 N.E.2d 357, 361 (1st Dist. 1975). But as we refer to the license and guaranty only to show that they are not inconsistent with the standing rule in Illinois—one applicable unless varied by contract—that the obligation to pay "royalties" follows the sale of the items, a trial is unnecessary.

The guarantors are required to compensate NGI for 5% of NGV's net sales of valves made with NGI's technology, for as long as NGV sells the valves (but no later than 1994), unless they have some additional defense that the district court did not discuss. We remand for a trial on the question whether Venvalvex is an alter ego of NGV. We dismiss Bettison as a party, with prejudice. The district court already has liquidated NGI's claim for the period November 1979-July 1980, so only the activities thereafter require further proceedings on either liability or damages, unless there are unadjudicated defenses. No costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

C-1

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NEWMAN-GREEN, INC., et al., *Plaintiffs,* v. ALEJANDRO ALFONZO-LARRAIN, R., et al., *Defendants.*	No. 82 C 7933

MEMORANDUM OPINION AND ORDER

Newman-Green, Inc. ("NGI") has charged Newman-Green de Venezuela ("NGV") and NGV shareholders Alejandro Alfonzo-Larrain R., Irene Larrain de Caplan, Rafael Tudela, Alberto Tudela and William Bettison (collectively "Guarantors") with violations of various agreements involving NGV's manufacture and sale in Venezuela of NGI's patented aerosol valves. Three motions have now been filed:

1. NGI moves under Fed. R. Civ. P. ("Rule") 56 for summary judgment as to Counts I and IV of NGI's Complaint (collectively the "Complaint").[1]

2. Guarantors move under Rule 56 for summary judgment, or alternatively under Rule 12(b)(2) for dismissal for lack of personal jurisdiction, as to Counts V and VI.

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[1] NGI had originally filed a one-count Complaint against Guarantors alone. Its Amended Complaint reasserted that claim as Count I and added Counts II and III. Its Second Amended Complaint was really an amendment to the Amended Complaint rather than a self-contained document: It incorporated Counts I-III by reference, then went on to add Counts IV-VI. In the interest of simplification, this opinion will simply employ the generic term "Complaint" as though there were a single final product embodying all six counts.

3. NGI moves for a stay of Counts V and VI.[2]

For the reasons stated in this memorandum opinion and order:

1. NGI's motion for summary judgment is granted as to Count I but denied as to Count IV, which is dismissed.

2. Guarantors' alternative motion for their dismissal from Counts V and VI is granted.

3. NGI's motion for a stay of Counts V and VI is denied.

Facts[3]

NGI, an Illinois corporation, has manufactured and sold patented aerosol valves for at least 30 years. During the

[2] For convenience in identifying the source of particular arguments (there are three sets of briefs, one for each motion), this opinion will refer first to the party (either NGI or "G" for Guarantors), then follow the initial or initials with the number 1 (for NGI's summary judgment motion on Counts I and IV), 2 (for Guarantors' summary judgment motion on Counts V and VI) or 3 (for NGI's motion for a stay of Counts V and VI), followed by the name of the particular document: "Statement" (for Statement of Undisputed Facts, or Statement of Genuine Issues of Material Fact), "Mem." (for Memorandum) or "R. Mem." (for Reply Memorandum). For example, Guarantors' Statement of Genuine Issues in opposition to NGI's motion for summary judgment on Counts I and IV will be designated "G-l Statement ¶ —."

[3] Rule 56 principles impose on the party moving for summary judgment the burden of establishing the lack of a genuine issue of material fact *(Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986)). For that purpose this Court must view the evidence in the light most favorable to the nonmovant—Guarantors with respect to NGI's summary judgment motion, but then NGI for purposes of Guarantors' summary judgment motion *(Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2513 (1986)). That set of principles really poses no problems here, given the absence of factual disputes (except as to the termination date of the License Agreement, discussed later in the text). Many of the

(footnote continued on next page)

early 1970s NGI developed a business relationship with Guarantors out of a mutual desire to organize a Venezuelan company to manufacture and sell Newman-Green aerosol valves in Venezuela under an exclusive license from NGI. NGV was thus born. NGI owns 25% of NGV's capital stock, and Guarantors own the rest either directly or indirectly.

Following negotiations in both Illinois and Venezuela, NGI and NGV entered into a License Agreement,[4] to remain in effect from June 13, 1974 until June 13, 1994 "unless sooner terminated as hereinafter provided" (LA § III). NGV was required to pay NGI "for the benefits extended . . . five per cent (5%) of the net selling price of all aerosol valves . . . sold by [NGV] during the period of this agreement" (LA § VIII). As licensor, NGI was permitted (1) to cancel the License Agreement if NGV was prevented by a law or regulation from paying royalties to NGI (LA § XIV) or (2) to terminate it if NGV failed to perform (LA § XV(B)).

In the event of termination "by lapse of time or otherwise," LA § XVII provided:

> A. Licensee shall not thereafter manufacture or sell NEWMAN-GREEN aerosol valves, accessories or parts or any other items produced with the aid of any procedures at any time furnished by Licensor; provided, however, that Licensee may sell any such valves and other

(footnote continued from preceding page)

preliminary facts summarized here are taken from this Court's previous opinion denying Guarantors' motion for summary judgment as to Count I ("Opinion I," 605 F.Supp. 793 (N.D. Ill. 1985)). Only facts reported for the first time in this opinion are followed by citations to the record. All references to Complaint provisions will take the form "Cplt. ¶ —," while references to the Affidavit of Guarantor Bettison (attached to the G-l Statement) will take the form "Aff. ¶ —."

[4] All references to License Agreement provisions will take the form "LA § —."

items manufactured prior to the effective date of any such termination.

* * *

F. Termination of this Agreement shall not relieve Licensee of its obligation to pay Licensor all royalties and other payments accrued hereunder prior to the effective date of such termination or thereafter with respect to the sale by Licensee of any aerosol valves or other items manufactured prior to the effective date of termination.

Provision was also made for NGI to seek damages if NGV breached the License Agreement (LA § XIIIV (sic—should be XVIII)):

> Nothing herein contained shall prevent Licensor from proceeding to enforce its rights if any for damages for breach of contract, for collection of royalties, or for any other relief to which it may be lawfully entitled.

Because of then-recently-enacted Venezuelan legislation, the parties recognized the License Agreement would not become enforceable unless and until it was approved by SIEX, an administrative arm of the Venezuelan government. NGV and Guarantors did not want to delay commencement of operations until approval was obtained (in which respect the lack of any SIEX track record made the timetable uncertain), while NGI was unwilling to risk any sale of its machinery or any provision of know-how to NGV absent further contractual assurances. That gap was bridged by NGV's and Guarantors' tendering of two additional letter agreements, both dated July 11, 1974:

1. NGV's Confidentiality Agreement, signed (and indeed drafted) by NGV's president (Guarantor Alberto Tudela); and

2. Guarantors' Guaranty Agreement, signed by all five Guarantors and apparently drafted by NGI attorney Perry Carvellas.

Under the Confidentiality Agreement, NGI committed itself to provide NGV with confidential information to allow

the start-up and operation of the valve assembly machinery. For that reason the agreement continued:

> It is understood and agreed that all of the aforesaid information is provided in confidence and under the terms and conditions of the license agreement.
>
> It is further agreed, in the event that for any reason the license agreement is not approved by the Venezuelan Government, that the confidentiality provisions and the termination and/or cancellation provisions of the license agreement are in full force and effect.

As for the Guaranty Agreement, its most material provision for current purposes was that defining the scope of Guarantors' undertaking:

> In consideration for the execution of the license agreement dated June 13, 1974 from [NGI] to [NGV], the undersigned personally, individually and/or collectively agree that they guarantee the payment to [NGI] of an amount of money up to the 5% royalty set forth in the license agreement and for the period of time specified in the license agreement.

After the Confidentiality and Guaranty Agreements were signed, NGI began performance by:

1. selling NGV valve-assembly machinery and valve components; and

2. providing technical training and assistance to NGV, at both NGI's Illinois plant and NGV's Venezuelan plant.

NGV began manufacturing and selling aerosol valves July 1, 1975. Between 1975 and 1980 NGV's sales revenue from the valves exceeded $7 million.

SIEX never approved the License Agreement. In December 1977 SIEX indicated it would do so with substantial modifications, but NGI found the changes unacceptable and they were never made. Despite its large sales volume, NGV never made any royalty payments to NGI, largely because—given the SIEX problem—the parties never worked out a mutually acceptable and legal way to transfer the funds to NGI.

On June 25, 1979 NGI terminated the still-unapproved License Agreement effective that August 1, but it then agreed to permit NGV to sell existing inventory until November 1 (Cplt. ¶ 27).[5] NGV continued, however, to manufacture and sell the aerosol valves without authorization until July 1980. Complaint Count I seeks royalty payments from Guarantors for NGV sales until November 1, 1979 (when NGI withdrew its authorization for those sales). Count IV asks "royalty" payments from Guarantors for NGV sales after November 1, 1979 until July 1980.[6]

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[5] Opinion I, 605 F.Supp. at 795 said NGI had terminated and withdrawn the License Agreement January 25, 1979. Actually NGI documents give both that January 25 date (Cplt. ¶ 90) and a June 25 date (Cplt. ¶ 27 and NGI-1 Statement ¶ 20). However, all NGI documents concur that the termination was not to be effective until the ensuing August 1 (later extended until November 1). Guarantors now dispute those dates (though, as later discussed in the text, they previously admitted them). They assert NGI notified NGV in a telex and letter dated January 11, 1979 that the License Agreement was being terminated effective April 1 (Aff. ¶ 11). Then, NGV says, NGI's June 25 telex and letter gave "final notice" of termination of the License Agreement effective August 1 (Aff. ¶ 12), but NGI ultimately gave NGV until November 1 to sell existing inventory (Aff. ¶¶ 13-14, denying Guarantors' agreement to either so-called "extension").

[6] Actually Count I literally asks for royalty payments for NGV sales from July 1, 1975 until May 1980. But NGI Mem. 2 n.2 explains:

> Count I of the First Amended Complaint was incorporated verbatim into the Second Amended Complaint. Its broad prayer for relief could be construed to cover the Guarantors' liability to NGI for NGV's sales both before and after November 1, 1979, *i.e.*, Count I could be construed to subsume Count IV. To the extent that it matters and may be necessary, NGI hereby moves to amend the prayer for relief in Count I of the Second Amended Complaint to seek judgment for the Guarantors' liability arising before November 1, 1979.

As the earlier-quoted language from the Guaranty Agreement reflects, Guarantors are liable to NGI for 5% of NGV's net sales "for the period of time specified in the license agreement."[7] From the time NGV began selling aerosol valves through and including August 31, 1979, NGV calculated the royalties due NGI and entered the amount in its financial records (Bettison 7/30/84 Dep. 177-79). Those royalties total 816,016 bolivares (Bettison 7/31/84 Dep. 196-99).

Although corresponding records were not kept after August 31, 1979, royalties accruing after that date are calculable from the record presented on NGI's motion. Based upon NGV's records from 1975 until 1979, 5% of NGV's *net* sales (allowing all returns and discounts) was on average equal to not less than 4.5% of its *gross* sales (Bettison 7/30/86 Dep. 170-81; and see G-1 Statement ¶ 26, which does not controvert the *factual* accuracy of the 4.5% figure). NGV's gross sales after August 31, 1979 were (NGI and G-1 Statements ¶¶ 24-25):

September 1979	880,105.39 bolivares
October 1979	853,053.05 bolivares
November 1979	862,618.39 bolivares
All of 1980	6,089,975.26 bolivares[8]

On that 4.5% of gross sales formula (which effectively gives Guarantors the benefit of favorable inferences), NGI is

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[7] Although they do not dispute the method of calculating damages, the parties hotly contest the meaning of "during the period specified in the license agreement." That liability issue is left for resolution later in this opinion.

[8] NGI Motion 4 n.1 waives its claim to royalties for NGV sales during December 1979 for purposes of its current motion, but NGI Mem. 8 reserves the right to claim such damages if the motion is denied (a questionable use of Rule 56, see Appendix to *Teamsters Local 282 Pension Trust Fund v. Angelos*, No. 86-3936, slip op. (N.D. Ill. Dec. 9, 1986), but one rendered moot by this opinion).

entitled (if it prevails) to 77,992.13 bolivares for September and October 1979, and 312,866.70 bolivares for November 1979 and all of 1980. Thus Count I damages are 894,008.12 bolivares, and Count IV damages are 312,866.70 bolivares. This Court's "Opinion II," 612 F.Supp. 1434, 1440-41 (N.D. Ill. 1985) has held the exchange rate on the date of NGV's breach should be used to convert Guarantors' obligation into dollars. That exchange rate remained essentially unchanged at 4.3 bolivares per $1 U.S. from 1973 until after July 1982 (Opinion II, *id.* at 1440; NGI and G-l Statements ¶ 27). At that exchange rate Guarantors' liability under Count I is $207,908.86 and under Count IV is $72,759.70, in each instance exclusive of prejudgment interest.

Complaint Count V seeks royalties from NGV and Guarantors for sales of aerosol valves by a company called "Venvalvex" from July 1980 until the present. NGI alleges in part:

> 125. Sometime before NGI terminated and withdrew its License Agreement with NGV, most or all of the shareholders of NGV devised a scheme to avoid their obligations to NGI under the confidentiality and termination provisions of the Confidentiality Agreement and their royalty obligations under the Guaranty Agreement. The defendants' scheme included organizing a new company [Venvalvex], owned and controlled directly or indirectly by individual shareholders of NGV (intentionally excluding NGI), operating this purportedly new company in the place and stead of NGV, allowing NGV to become inactive, and servicing NGV's former customers and accounts through the new company.
>
> * * *
>
> 130. To enable Venvalvex to manufacture and sell aerosol valves in place of NGV, defendants, on information and belief, have wrongfully obtained and, since 1980, have continued to use NGI's confidential, proprietary technical information and know-how, obtaining the same for

> Venvalvex from both NGV and from other sources, as explained in more detail below.

Count V alleges NGV and Guarantors thereby violated all three agreements—the License Agreement, Confidentiality Agreement and Guaranty Agreement. In addition to its Count V prayer for damages (to be measured by similarly applying the 5% of "net sales" royalty formula to Venvalvex), NGI's Count VI seeks a declaratory judgment that if NGV and Guarantors continue to sell aerosol valves through Venvalvex they will be in continuing breach of the Confidentiality Agreement and therefore liable to NGI for like 5% amounts on those future sales.

Procedural Background

Twice before this Court has faced motions for summary judgment as to Count I, which then sought royalty payments from Guarantors for NGV sales from July 1, 1975 until May 1980 (see n.6). On February 27, 1985 Opinion I denied Guarantors' motion for summary judgment, rejecting their theory Venezuelan law controlled the validity of the Guaranty Agreement and rendered it unenforceable. NGI then moved for partial summary judgment on Count I, seeking a determination Guarantors owed NGI the claimed amount of damages as of September 1, 1979. This Court refused to piecemeal a single claim under the Guaranty Agreement by dividing it into different time periods. Instead Opinion II granted summary judgment as to liability, with damages to be determined later. In April 1985 NGI again amended the Complaint to add Counts IV, V and VI. These motions followed.[9]

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[9] Counts II and III, which advance independent claims, are not now at issue.

NGI's Summary Judgment Motion on Counts I and IV

Guarantors level three challenges to NGI's current motion:

1. They say they are not liable under Counts I and IV for royalties for NGV sales after termination of the License Agreement, which they say occurred April 1, 1979.[10]

2. They claim *any* damage award is barred because the Guaranty Agreement had an illegal purpose.

3. They oppose any *current* damage award because those damages may be offset by NGV's counterclaims.

Finally Guarantors urge any damage award should exclude prejudgment interest. This opinion considers each contention in turn.

1. Period of Guarantors' Liability

Guarantors' first argument contesting liability poses two separate questions:

1. When did the License Agreement terminate?

2. Are Guarantors liable for royalties for NGV sales *after* that termination date?

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[10] G-1 Mem. 5 (emphasis added) pretends to challenge the amount of damages under Count I but in effect contests liability for damages after April 1, 1979:

> NGI has not proven the amount of defendants' liability which ceased as of April 1, 1979.

That approach is probably due to Guarantors' recognition of Opinion II's grant of summary judgment as to their Count I liability (which as then stated ran past the termination date, see n.6). Both because final judgment was not entered (the issue of damages remained) and because neither party had then focused the same arguments now asserted on the post-termination question, this opinion will address the post-termination liability issue under Count IV (and Count I as it reads literally).

Each will be dealt with, though only the second merits serious consideration.

Guarantors' own documents reveal the absurdity of their assertion the License Agreement terminated April 1, 1979. In fact, their own initial pleading recognized as much. NGI's original Complaint ¶ 16 (unchanged in NGI's two amendments) alleged NGI served notice of termination of the License Agreement effective August 1, 1979, and then by agreement NGI allowed NGV to continue sales until November 1 to exhaust current inventory. Guarantors' original Answer ¶ 16 responded:

> Defendants admit the Venezuelan Government failed to approve the Licensing Agreement and that plaintiff purported to terminate the relationship between NGI and NGV on June 2S, 1979, ultimately effective November 1, 1979.

Indeed there is more. NGI's statement of uncontested material facts, filed under this District Court's General Rule 12(e) at the time of NGI's original Count I summary judgment motion and readopted on the current motion, specifically identified the November 1 termination date (NGI-1 Statement ¶ 20). Guarantors did not controvert that, as General Rule 12(f) requires. That should really foreclose Guarantors' current factual attack on November 1 as the License Agreement's termination date (General Rule 12(f) specifically says all such uncontroverted facts "will be deemed to be admitted"). But because Guarantors' attack must fail on substantive as well as procedural grounds, this opinion will deal briefly with Guarantors' contention on its own terms.

Guarantors now assert (Aff. ¶ 11) NGI notified NGV January 11, 1979 of its proposed termination of the license agreement effective April 1. But the same affidavit acknowledges NGI did not implement that notice. Instead Guarantors concede NGI later notified NGV it would not terminate until August 1 and ultimately permitted NGV to sell existing inventory until November 1 (Aff. ¶¶ 12-14),

though they say they did not accede to those "extensions" (*id.*).

Until NGI carried out its plan and in fact cut off NGV's right to sell on November 1, the License Agreement remained in effect and NGV's royalty obligations continued to accrue. Guarantors cannot escape liability for royalties for NGV sales authorized under the License Agreement simply by asserting they never (Aff. ¶¶ 13-14) "considered extending any obligations we had under the Guaranty Agreement. . . ." This is not at all a case of *extending* the principal obligor's liability, which under conventional doctrines of guaranty and suretyship discharges the guarantor (on the theory the extension created a risk not bargained for). Instead Guarantors are being held responsible for exactly what they contracted for: royalties during the term of the License Agreement. They had no vested or enforceable right in a particular termination date, if the contracting parties then agreed on a different one, still within the original term, before termination ultimately took place.[11]

Because Count I seeks royalties only for NGV sales before the November 1, 1979 termination of the License Agreement—royalties for which Guarantors are clearly obli-

[11] Were Guarantors somehow able to convince this Court the License Agreement terminated August 1 (despite the parties' having agreed to permit NGV sales until November 1), Guarantors would still be obligated to pay royalties for sales until the later date. Even on the false assumption the so-called post-termination "extension" to permit sale of existing inventory could be labeled (G-l Mem. 8) "an additional modification to the underlying obligation," Guarantors had knowledge of it and must be held to have given their implied consent despite their current protestations (it will be remembered Guarantors are NGV's shareholders, so they seek to accord their company the benefit of the sales without accepting the corollary royalty obligation). Hence Guarantors would not be discharged from their obligation by that "modification" (*Alton Banking & Trust Co. v. Sweeney*, 135 Ill.App.3d 96, 103, 481 N.E.2d 769, 774 (5th Dist. 1985)).

gated under the Guaranty Agreement—this Court grants NGI's motion for summary judgment as to that Count. NGI is awarded damages in the principal amount of $207,908.86.

Count IV is another story. It claims royalties for *post*-termination sales, thus posing the more difficult question whether Guarantors are liable for royalties for NGV sales prohibited rather than authorized under the License Agreement.

Guarantors urge "the period of time specified in the license agreement" (the language of the Guaranty Agreement) is defined in LA § XVII(F) (emphasis added):

> Termination of this Agreement shall not relieve Licensee of its *obligation to pay Licensor* all *royalties* and other payments accrued hereunder prior to the effective date of such termination or thereafter *with respect to the sale* by Licensee *of any aerosol valves* or other items *manufactured prior to the effective date of termination.*

Under Guarantors' reading of the agreements, they are liable only for royalties for NGV sales of aerosol valves manufactured before the November 1, 1979 termination date of the License Agreement.

NGI would have it otherwise. Its theory is that the critical phrase "for the period of time specified in the license agreement" means the original term of the license agreement: June 13, 1974 to June 13, 1994. But LA § III itself says that 20-year term applied "unless sooner terminated as hereinafter provided." And NGI in fact did "sooner terminate[ ]" the License Agreement. NGI finds no comfort in the documents' literal language.

Alternatively NGI-l R. Mem. 7-8 urges NGI (based on NGV's failure to stop manufacturing and selling aerosol valves upon termination of the agreement, LA § XVII(A)) is entitled to royalties for Count IV sales under LA § XIIIV (sic):

> Nothing herein contained shall prevent Licensor from proceeding to enforce its rights if any for damages for

> breach of contract, for collection of royalties, or for any other relief to which it may be lawfully entitled.

That provision, however, merely entitles NGI to "damages" for NGV's breach of contract—not to "royalties" for NGV sales prohibited under the License Agreement. Indeed the document's very juxtaposition of "damages" with "royalties" underscores the distinction between the two concepts. Merely because a court may compute damages by reference to the 5% of net sales royalty figure (for obvious reasons) does not change the meaning of the contract provision.

Even if there were some plausible way to construe the Guaranty and License Agreements to hold Guarantors liable under Count IV, long-standing and familiar doctrine would preclude this Court from doing so. *Telegraph Savings & Loan Association v. Guaranty Bank & Trust Co.*, 67 Ill.App.3d 790, 794, 385 N.E.2d 97, 100 (1st Dist. 1979) (citation omitted) instructs:

> Under well established Illinois law, a guarantor is to be accorded the benefit of any doubt which may arise from the language of the contract; his undertaking is to be strictly construed; his liability is not to be varied or extended beyond its precise terms by construction or implication; and he is bound only to the extent and in the manner and under the circumstances pointed out in his obligation.[12]

It would not be a reasonable, much less a strict, interpretation of the Guaranty Agreement to read "for the period of time specified in the license agreement" to cover sales made *after* termination of that agreement and expressly forbidden under it.

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[12] [Footnote by this Court] That general rule contains an exception permitting construction *against* the guarantor where the guaranty is given for the business advantage of, and is written by, the guarantor (4 Williston, *Treatise on the Law of Contracts* § 625, at 829 (3d ed. 1961)). That exception has no application here: NGI's attorney drafted the Guaranty Agreement.

What NGI really asks of this Court is to save NGI from its current predicament by rewriting the Guaranty Agreement to hold Guarantors liable for royalties for Count IV sales. Even assuming Guarantors are in the wrong and NGI must pursue them on foreign soil, this Court has found no case (and NGI has certainly identified none) that says a court may rewrite a contract between two sophisticated parties based on general equitable notions. On the contrary, what little case law this Court has been able to dredge up tells us courts may not interfere in such business dealings. *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986); *First New Jersey Bank v. F.L.M. Business Machines, Inc.*, 325 A.2d 843, 850-51 (N.J. Super. Ct. Law Div. 1974).

NGI knew, when its attorney drafted the Guaranty Agreement, Guarantors controlled 75% of NGV. NGI even anticipated, via the Confidentiality Agreement, the possibility NGV might continue to manufacture and sell aerosol valves after NGI withdrew its authorization. It would have been a simple matter for NGI to have negotiated the Guaranty Agreement to cover the same contingency—to make it applicable to *all* NGV sales, whether authorized or in breach of the License Agreement. Because NGI failed to contract for that open-ended guaranty, its remedy for Count IV sales (if it has one against Guarantors, and not just against NGV) is not under the Guaranty Agreement.

NGI's motion for summary judgment as to Count IV is denied. Instead that Count is dismissed on the merits. This opinion turns, then, to the recoverability of the damages already found under Count I.

2. "Illegal Purpose" Barrier to Damages

G-1 Mem. 3-4 urges this Court should not award damages under Count I because the purpose of the Guaranty Agreement was "to ensure and effect a royalty payment in excess of SIEX limitations and in violation of Venezuelan law." Under Illinois law, Guarantors continue, a guaranty agree-

ment designed to accomplish an unlawful purpose is illegal and void. Therefore, G-1 Mem. 4 reasons, Illinois law requires this Court to deny NGI the "benefits of an illegal bargain" and "recovery under a contract the performance of which involves a violation of law."

That position merits short shrift, for it is virtually identical to the argument previously offered by Guarantors and rejected in Opinion I, 605 F.Supp. at 798. There the question was (emphasis in original) "whether an Illinois court would defer to Venezuelan law on enforceability—*in spite of* the parties' choice of Illinois law—to protect a *Venezuelan* public policy." Opinion I, *id.* reasoned in part (emphasis in original, footnote omitted):

> Let us assume arguendo the SIEX legislation was a Venezuelan law aimed at protecting that country's nationals from overreaching by foreign investors. But Venezuela's assumed interest in thus sheltering its nationals cannot be deemed "materially greater" [under Restatement (Second) of Conflict of Laws § 187(2)(b)(1971)] than Illinois' interest in protecting *its* citizens from the unjust enrichment of foreigners who obtain valuable property (by entering into contracts they do not intend to honor) and try to escape just liability for its payment. And the latter result is all the Guaranty Agreement seeks to avoid.

Opinion I therefore concluded Illinois courts would not preclude enforcement of the Guaranty Agreement by deferring to Venezuelan law. There is no more reason to find Illinois courts would frustrate that result by refusing to award damages for the breach of that selfsame agreement.[13]

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[13] Guarantors claim this Court "reserved" that question in Opinion II, 612 F.Supp. at 1438 n.6. That assertion reads too much into a footnote that simply made clear this Court was deciding only issues necessary for its then-issued opinion. Now the question has been posed squarely, and Guarantors have offered no better arguments than those that failed to carry the day in Opinion I.

3. NGV Counterclaims

G-1 Mem. 13-14 urges summary judgment is inappropriate because of the "potential setoff" from NGV's potential recovery on its counterclaims. Indeed Guarantors observe NGV's recovery "may very well exceed" NGI's damage award. But Guarantors have not suggested NGI's right to look to them under the Guaranty Agreement is conditioned on the establishment of NGV's liability to NGI, or on any exhaustion of remedies against NGV as the principal obligor. They could scarcely do so, for the entire purpose of the Guaranty Agreement was to assure NGI an enforceable source of royalty payments if the License Agreement were *not* enforceable against NGV (see Opinion I, 605 F.Supp. at 796-97). That being true, NGI-1 R. Mem. 13 is quite correct that *NGV's* potential recovery on counterclaims not asserted by Guarantors is wholly irrelevant to *Guarantors'* liability for damage under Count I.

Guarantors also suggest NGV's counterclaims create a genuine issue of fact as to Guarantors' liability because (G-1 Mem. 14):

> In this case, NGI's claim for royalty payments is closely related to the allegations in the Counterclaim that NGI failed to fulfill the very obligations upon which NGI bases its claim.

But Guarantors do not bother to attempt to substantiate that conclusory statement by identifying and analyzing relevant portions of the License Agreement to determine whether the counterclaims, if proved, would eliminate NGI's right to royalties.[14] It is not this Court's responsibility to do Guarantors' legal work for them.[15]

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[14] NGI R. Mem. 13 says:

> NGV's counterclaims are not factually related to Counts I and IV and do not arise from those claims. NGV's counterclaims involve alleged breaches of different obligations and will require adjudication of different factual issues.

[15] Though the matter need not be resolved for current purposes, it seems at least questionable (now that Guarantors have been found liable only for Count I royalties) that NGV's

(footnote continued on next page)

Neither argument based on NGV's counterclaims is persuasive. Guarantors simply have not established any genuine issue of fact precluding summary judgment as to Count I.

4. Prejudgment Interest

G-1 Mem. 15 also fails to convince this Court prejudgment interest should not be awarded because NGI's claims are allegedly not liquidated. Guarantors' "support" for that assertion is twofold:

> 1. Royalties cannot be calculated with substantial certainty until all returns and other adjustments have been calculated.
>
> 2. Setoffs, as alleged in the Amended Counterclaim, affect the amount due.

But Guarantors have not disputed the easy calculation of royalties described earlier in this opinion—only their liability for those royalties. And this Court has already found Guarantors' liability for damages is not subject to setoff by NGV's potential recovery on its counterclaims. Hence this Court finds an award of prejudgment interest wholly appropriate.

Guarantors' Motion for Dismissal of Counts V and VI[16]

Counts V and VI charge NGV and Guarantors formed a new company, Venvalvex, through which they continued manufacturing and selling aerosol valves after July 1980 in violation of all three agreements: the License Agreement,

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(footnote continued from preceding page)

counterclaims could ultimately defeat NGI's entitlement to those royalties. NGV itself, having included those royalties (except for the months of September and October 1979) in its financial records, appears to have acknowledged NGI's entitlement to them.

[16] For the reasons later explained in the text, Guarantors' alternative motion for summary judgment is inappropriate.

Confidentiality Agreement and Guaranty Agreement. Additionally NGI-2 Mem. 2-3 now explains:

> [T]he Venvalvex claims sound primarily in contract and allege facts that very likely, in addition, constitute an independent tort against NGI by the Guarantors.

Guarantors' theory in support of dismissal of Counts V and VI is twofold:

> 1. Guarantors are parties only to the Guaranty Agreement and not to the Confidentiality Agreement. Their liability under the Guaranty Agreement, for the reasons already discussed, is limited to royalties for NGV sales *before* the November 1, 1979 License Agreement termination. Thus summary judgment is appropriate if NGI seeks relief for breach of contract under Counts V and VI.
>
> 2. Assuming Guarantors could nevertheless be held liable because their conduct was in some way tortious, this Court lacks personal jurisdiction over Guarantors for any such claim.

Both arguments are sound.

1. Guarantors' Contractual Liability

This opinion has already determined Guarantors are liable under the Guaranty Agreement only for royalties for NGV sales authorized under the License Agreement. As to Counts V and VI, however, NGI makes two new arguments that require further analysis.[17]

NGI-2 Mem. 12 first suggests Guarantors may be liable for "breach of [their] contractual duty of good faith and fair

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[17] NGI-2 Mem. 4 also says this Court considered and rejected Guarantors' "narrow" reading of the Guaranty Agreement in an April 5, 1985 oral bench ruling. That ruling granted NGI's motion to amend its Complaint to add Counts IV, V and VI after this Court found it "arguable" Guarantors were liable under the Guaranty Agreement for the relief sought in those Counts. Of course an entirely different question is now posed: Guarantors' *actual* liability vel non.

dealing owed to NGI under the Guaranty Agreement and its companion agreements." NGI-2 Mem. 11-12 reasons:

> One purpose of the Guaranty Agreement was to ensure that NGI would be paid a royalty for its performance under the Confidentiality Agreement. The Guarantors guaranteed payments based upon NGV's sales, the sales of a corporation they controlled and of which they collectively owned 75%. Under the Guaranty Agreement, and particularly given the circumstances of its execution, Guarantors had a duty to refrain in good faith from forming another corporation predominantly owned and controlled by them and, through that instrumentality, exploiting indirectly the [NGI] valve assembly technology that, under the terms of the Confidentiality Agreement, NGV could not have exploited royalty-free.

To be sure, both parties to a contract impliedly promise to act in good faith (*Rao v. Rao*, 718 F.2d 219, 222 (7th Cir. 1983), citing and quoting from *Osten v. Shah*, 104 Ill.App.3d 784, 786, 433 N.E.2d 294, 296 (5th Dist. 1982)).[18] But close scrutiny of NGI's contention reveals the flaw in its theory Guarantors breached that promise.

Under the Guaranty Agreement Guarantors promised to pay NGI royalties for NGV sales authorized under the License Agreement. That is all. NGI does not assert Guarantors attempted to evade *that* obligation through their conduct. Instead it points to Guarantors' conduct *after* NGI terminated the License Agreement (and hence Guarantors' direct liability for royalties), asserting Guarantors' conduct was an attempt to evade *NGV's* obligations under the *Confidentiality Agreement*.

---

[18] G-2 R. Mem. 7, however, cites case law in support of the proposition that in Illinois there is no independent cause of action for breach of an implied duty of good faith and fair dealing (see *Gordon v. Matthew Bender & Co.*, 562 F.Supp. 1286, 1289 (N.D. Ill. 1983) (the good faith and fair dealing principle is essentially used as a construction aid in determining the parties' intent)). As the text discussion reflects, NGI cannot prevail even on the opposite premise.

In other words, NGI asks this Court to treat NGV and Guarantors as a single entity that entered into both the Guaranty Agreement and the Confidentiality Agreement. But NGI suggests no reason for doing so other than the fact Guarantors own 75% of NGV's stock. As before, NGI again asks this Court to make and enforce a contract NGI could have made—but did not. See *Frandsen,* 802 F.2d at 947.

Next NGI-2 Mem. 12-13 urges Guarantors were actually parties to the Confidentiality Agreement under the contemporaneous execution doctrine. That impermissibly attempts to stretch Opinion II, 612 F.Supp. at 1437 & n.4. There this Court explained that because the Confidentiality and Guaranty Agreements were executed at the same time and in the course of the same transaction, they must be read and construed together (despite the fact the parties to those agreements were not identical). NGI cannot leap from that rule of contract construction to the conclusion this Court may treat Guarantors as *parties* to the Confidentiality Agreement, even though they did not sign that document. That conclusion is of course absurd and finds no support in the case law.

Accordingly Guarantors have no contractual liability under the Guaranty Agreement for the relief sought in Counts V and VI. This opinion turns to the next question: Assuming Guarantors may be liable under a tort theory, does this Court have personal jurisdiction over them?

2. Personal Jurisdiction[19]

Personal jurisdiction was not at issue when this Court examined Guarantors' liability under the Guaranty Agreement, for that agreement provides:

> For the purposes of this agreement the undersigned agree by virtue of the license agreement between [NGI and

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[19] Ordinarily the defense of lack of personal jurisdiction is waived under Rule 12(h) if not asserted in the responsive pleading or in a motion made before pleading (see Rule 12(b)). However, when NGI amended its Complaint to add Counts V and VI Guarantors asked for and were granted the right to

(footnote continued on next page)

> NGV] that they are doing business in Addison, Illinois. . . .

On the premise (now approved by this opinion) that NGI's Count V and VI claims may not be based on the Guaranty Agreement, G-2 Mem. 9 urges this Court has no personal jurisdiction over Guarantors. That assertion is based, as it should be, on Guarantors' examination of the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, ¶ 2-209 ("Section 2-209[']).[20]

Under Section 2-209 Guarantors are subject to this District Court's personal jurisdiction only if the causes of action advanced in Counts V and VI arise from Guarantors' (1) transaction of any business within Illinois or (2) commission of a tortious act within Illinois.[21] G-2 Mem. 13 asserts Guarantors have never transacted business in Illinois except as fiduciaries for NGV and before the allegedly tortious acts took place. Nor, G-2 Mem. 11-12 contends, have Guarantors committed tortious acts in Illinois. Indeed examination of NGI's Complaint ¶¶ 134-44 reveals all the allegedly tortious acts took place outside of Illinois, mostly in Venezuela and Germany. Furthermore, even if those acts had the effect of injuring NGI (an Illinois corporation) financially, G-2 Mem. 13-14 notes that is an insufficient basis upon which to base personal jurisdiction (*Green v. Advance Ross Electronics Corp.*, 86 Ill.2d 431, 438, 427 N.E.2d 1203, 1207-08 (Ill. 1981)).

(footnote continued from preceding page)

move for dismissal for lack of personal jurisdiction at a later date.

[20] *Jacobs/Kahan & Company v. Marsh*, 740 F.2d 587, 589 (7th Cir. 1984) states the fundamental rule that "[a] federal district court in Illinois has personal jurisdiction over a party in a diversity action only if an Illinois court would have such jurisdiction."

[21] Section 2-209 specifies three other acts as possible bases for long-arm jurisdiction, but they obviously do not apply here.

NGI-2 R. Mem. 16 responds only by citing *Jacobs/Kahan*, 740 F.2d at 591 and stating:

> those [tort] claims clearly "lie in the wake" of the Guarantors' stipulated transaction of business in this forum, and thus "arise" from those jurisdictional acts.

But that is a distortion of the "lie in the wake concept" announced by the Illinois courts and applied by both state and federal courts (see, e.g., *Jacobs/Kahan* and cases cited). There is no claim Guarantors' original execution of the Guaranty Agreement was part of the later-developed tortious scheme alleged in Counts V and VI. Once more, all Guarantors did in the Guaranty Agreement was to promise to pay royalties for NGV sales authorized under the License Agreement—making it quite clear it was only "[f]or the purposes of this agreement" that they were "doing business" in Illinois.

Accordingly, to the extent NGI may have tort claims against Guarantors, this Court lacks personal jurisdiction over them. Hence it cannot adjudicate those claims.

3. Disposition of Counts V and VI

In light of the just-completed analysis, summary judgment in Guarantors' favor on Counts V and VI would be improper. Such a final judgment on the merits could carry with it serious claim preclusion (res judicata) consequences, anomalous in view of the purely procedural basis for rejecting any tort claim against Guarantors here. Accordingly Counts V and VI are simply dismissed against Guarantors for the reasons already stated.

NGI's Motion To Stay Counts V and VI

NGI has also asked a stay of Counts V and VI. Now that Guarantors have been dismissed from those Counts, only NGV remains as a defendant. Whatever force NGI's motion may have had (an issue that need not be resolved), none remains now.

Indeed NGI-3 Mem. 1 & n.1 says (emphasis added):

> Plaintiffs seek a stay of NGI's claims against the *Guarantors*. . . .

* * *

> NGI has also named [NGV] as a defendant in the Venvalvex claims, but, due to the practical difficulties of enforcing a judgment against NGV, NGI primarily looks to the Guarantors for relief in connection with the Venvalvex claims.

NGI's stated objective in seeking the stay was to avoid the expense of discovery on Counts V and VI until it learned whether it would be able to enforce a judgment against Guarantors.[22] NGI's theory was that once a stay was granted, it could seek immediate enforcement of its Count I claim against Guarantors—then, depending on whether it was successful, decide whether to proceed with or dismiss Counts V and VI.

Count I has now been reduced to judgment against Guarantors, so that if a Rule 54(b) determination were made NGI would now be able to seek immediate enforcement of that claim. But whether or not NGI could succeed in such enforcement would reveal nothing about NGI's likelihood of enforcing a judgment against *NGV*. Moreover, G-3 Mem. 11 points out Counts V and VI ask damages for continuing conduct, so it would be unfair to force NGV to remain at possible risk and allow potential damages to multiply while NGI does nothing to prove its claims. Finally, NGV's counterclaims and the Count V and VI claims, which represent possible offsets, ought to move forward simultaneously. NGI's motion for a stay is denied.

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[22] NGI had planned to enforce its judgment against Guarantors in part by executing upon Guarantor Alfonzo-Larrain's partnership interest in the Baker & McKenzie law firm. Guarantors' counsel, however, has tendered to NGI what purports to be a copy of a Venezuelan court decision, in a case between Alfonzo-Larrain and his wife, that may preclude NGI from executing upon that partnership interest.

CONCLUSION

There is no genuine issue of material fact on any of the current motions. They are resolved in this manner:

1. On Count I NGI is entitled to a judgment against Guarantors as a matter of law in the sum of $207,908.86 plus 5% per annum prejudgment interest beginning January 31, 1980 (the date NGI-1 Mem. 11 has agreed to).

2. Count IV is dismissed. However, for the same reasons specified in this opinion's discussion of Counts V and VI, such dismissal is without prejudice to NGI's possible assertion—in a court of competent jurisdiction—of a tort claim against Guarantors for NGV's post November 1, 1979 manufacture and sale.

3. Guarantors are dismissed from (rather than being awarded summary judgment on) Counts V and VI.

4. NGI's motion for a stay of Counts V and VI is denied.

Only one issue remains: the possible issuance of a Rule 54(b) determination as to Count I. That is not simply a matter of course; see *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980); *United States General, Inc. v. Alberi*, 792 F.2d 678, 680-81 (7th Cir. 1986). Both NGI and Guarantors are ordered to file submissions in that respect on or before December 31, 1986 (NGI's to be accompanied by a proposed form of judgment order in the appropriate amount, including proposed Rule 54(b) findings).

Milton I. Shadur
United States District Judge

Date: December 17, 1986

APPENDIX D

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NEWMAN-GREEN, INC., et al., *Plaintiffs,* v. ALEJANDRO ALFONZO-LARRAIN, R., et al., *Defendants.*	No. 82 C 7933

SUPPLEMENT TO MEMORANDUM OPINION AND ORDER

This Court's December 17, 1986 memorandum opinion and order (the "Opinion") granted the summary judgment motion of Newman-Green, Inc. ("NGI") on Count I of the Second Amended Complaint (the "Complaint"). Opinion at 30 requested the parties to make submissions as to the possible issuance of a Fed. R. Civ. P. ("Rule") 54(b) determination as to Complaint Count I. Those submissions have now been made, and this Court has considered them.

This Count finds all relevant factors point in favor of a Rule 54(b) determination: the unquestionable liability of the Count I defendants and the substantial amount involved; the facts that (1) this action has already been pending for over four years and (2) a substantial period of time will necessarily elapse before the other claims in this case can possibly become capable of final resolution (during which period the Count I judgment would remain unenforceable absent a Rule 54(b) determination); NGI's risk of non-collectability of any judgment entered (a risk confirmed by statements made by defendants' counsel); the absence of any probable set-off to the Count I claim; and the significant differences between the factual and legal issues involved in

Count I and those involved in the other still-pending claims in the case.

Among other arguments the Count I defendants advance in their Memorandum in Opposition to Rule 54(b) Certification, they contend (1) Counts I and IV are virtually identical in a number of respects and (2) judgment on Count I should not be made final before Counts V and VI are finally adjudicated. Those arguments might perhaps be viewed as a bit disingenuous, given this Court's total dismissal of Count IV in Opinion at 14-18 and its dismissal of Counts V and VI against the Count I defendants in Opinion at 22-28 (this Court thus having determined Count I represents the only viable claim as to which this Court has personal jurisdiction over those defendants). What the Opinion's rulings represent in the aggregate is a disposition of *all* NGI's claims asserted in this action against the Count I defendants—and all that is required to make that a *final* disposition is a Rule 54(b) determination. See *National Metalcrafters v. McNeil*, 784 F.2d 817, 821 (7th Cir. 1986).

Accordingly this Court expressly determines that there is no just reason for delay and expressly directs the entry of final judgment on Count I. It also expressly determines that there is no just reason for delay and also expressly directs the entry of final judgment as to (1) its dismissal of the asserted contract claims in Counts IV, V and VI as to the Count I defendants on the merits and (2) its dismissal of any potential tort claims under Counts IV, V and VI against those defendants for lack of personal jurisdiction over them. These determinations and directions finally dispose of all NGI's claims in this action against those defendants.

It is hereby ordered and adjudged:

1. NGI shall have judgment in its favor on Count I of its Complaint against Alejandro Alfonzo-Larrain R., Irene Larrain de Caplan, Rafael Tudela, Alberto Tudela and William L. Bettison, jointly and severally, in the total amount of $279,936.46, representing the principal amount of $207,908.86 plus 5 percent per annum

prejudgment interest on that principal amount from January 31, 1980 to the date of this judgment.

2. This Court has no jurisdiction over the persons of any of the defendants named in paragraph 1 as to any tort claims by NGI in Counts IV, V and VI, and has determined NGI's contract claims in those counts against those defendants are without merit. It dismisses those counts as to those defendants.

3. This Court, having determined pursuant to Rule 54(b) that there is no just reason for delay, hereby directs the Clerk of the District Court to enter a final judgment for that amount as to the claim stated in Complaint Count I, and a final judgment of dismissal of Complaint Counts IV, V and VI as to the defendants referred to in paragraph 1 (on the merits as to asserted contract claims, and for lack of personal jurisdiction over those defendants as to asserted tort claims).

Milton I. Shadur
United States District Judge

Date: January 5, 1987

OPPOSITION

BRIEF

No. 88-774

Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1988

NEWMAN-GREEN, INC.,

Petitioner,

v.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

FRANK K. HEAP
CHARLES G. ALBERT*
FREDRIC A. COHEN

BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Respondent

* *Counsel of Record*

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTIONS PRESENTED

Whether a Court of Appeals may be compelled to invest itself retroactively with subject matter jurisdiction by dismissing an essential, although dispensable, nondiverse party in a suit brought under the provisions of 28 U.S.C. § 1332(a).

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No. 88-774

In The
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NEWMAN-GREEN, INC.,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Newman-Green, Inc. ("NGI") brought this action in 1982 to recover under a guaranty entered into by Alejandro Alfonzo-Larrain, Irene Larrain de Caplan, Rafael Tudela, Alberto Tudela and William L. Bettison (hereinafter jointly referred to as "guarantors"). The purpose of the

agreement, as stated, was to guarantee only the payment of an amount of money up to the 5 percent royalty set forth in, and only for the period of time specified in, a license agreement between NGI and a Venezuelan company, Newman-Green de Venezuela ("NGV"), for the sale of aerosol valves. With the exception of Mr. Bettison, guarantors are all Venezuelan citizens. Mr. Bettison is a U.S. citizen residing in Venezuela. Nevertheless, jurisdiction of the court was invoked under 28 U.S.C. § 1332 (a).

The parties conducted discovery in which Mr. Bettison served as the sole source of information from and about NGV. He provided interrogatory answers, produced documents and gave two days of testimony in the only deposition taken during the entire course of the litigation. Based upon this discovery, the parties filed cross motions for summary judgment. The district court granted summary judgement to NGI on Count I and dismissed the guarantors from the remaining counts. The district court ruled that guarantors were liable only for payments during "the period of time specified in the license agreement," as expressly stated in the guaranty, and further, that the period ended when NGI gave its notice of termination. NGI appealed.

On appeal, a panel of the Seventh Circuit reversed, construing Illinois common law to make guarantors liable for royalty payments for as long as NGI's technology was used. 832 F.2d at 422. The court reached its decision, however, only after Mr. Bettison, a nondiverse party, was dismissed from the case. 832 F.2d at 419. ("There is an obstacle to reaching [the substantive] issue, however: subject matter jurisdiction. We haven't any").

Guarantors petitioned for a rehearing *en banc*. The Seventh Circuit granted the petition and vacated the panel's decision, 838 F.2d 968. On rehearing *en banc*, the court, adhering to its previous decisions, held that it could not dismiss an essential, albeit dispensable, party in order to retain federal jurisdiction and decide the case as though

the party had never participated in the litigation. The Court of Appeals ordered the case remanded to the district court for further consideration of whether the suit can proceed in any fashion in the federal courts. 854 F.2d at 927.

SUMMARY OF REASONS FOR DENYING PETITION

In vacating the panel's decision and the district court's judgments, the Court of Appeals held that the district court must decide, in the first instance, how and whether this case should proceed in the federal courts. Given the dispute over whether Mr. Bettison was "essential" or "nonessential" to the determination of the merits below, and whether his presence prejudiced any party, this approach is sound. Moreover, it is consistent with the results, if not the underlying theories, of decisions by other courts of appeals faced with a nondiverse party that destroyed jurisdiction. A different ruling by this Court on the question of the power of the courts of appeals to dismiss nondiverse parties will not necessarily change the result reached by the Seventh Circuit because the issue of prejudice should be decided by the district court.

Further litigation may also provide greater illumination of the issues because, on remand, the district court is likely to be faced with the question of its power to dismiss Mr. Bettison under Rule 21 of the Federal Rules of Civil Procedure. Although NGI seeks, *inter alia*, to have this Court consider the scope of Rule 21, that issue has not been considered fully by the court of appeals and not at all by the district court. Therefore this case, in its current posture, does not present that issue to this Court.

Finally, the Court of Appeals' decision is correct. In view of *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), and this Court's recent decision in *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988), no doubt exists as to how a court of appeals should resolve a question of subject matter jurisdiction under these cir-

cumstances. The Court of Appeal's ruling is a reasonable response to those decisions and other courts of appeals will likely follow suit. Further review by this Court is not warranted at this time.

ARGUMENT

I

THE RESULT BELOW DOES NOT REPRESENT A DIRECT CONFLICT WITH THE RESULTS REACHED IN OTHER CIRCUITS

In its present posture, the Court of Appeals' decision does not establish the kind of conflict that this Court need address. There is no reported decision holding that a federal court is compelled to dismiss a nondiverse party in order to perfect jurisdiction. Indeed, the statutory provisions relied upon by NGI for its argument that such a result is compulsory are couched in permissive terms. *See* 28 U.S.C. § 1653 ("Defective allegations of jurisdiction *may* be amended, upon terms . . .); Fed. R. Civ. P. 21 ("Parties *may* be dropped . . . on such terms as are just"). Even the dissent below concedes this. 854 F.2d at 937. ("To say that an appellate court may dismiss a party in order to secure subject matter jurisdiction is not to say that it ought to"). Nevertheless, NGI would have this Court review the Seventh Circuit's decision even though it is clear from its opinion that, even if it had the power to dismiss Mr. Bettison from the case, it still would have returned the matter to the district court to make that determination.

NGI, in positing the issue presented by its petition as whether a "nonessential nondiverse defendant" can be dismissed by a court of appeals, begs the question. Guarantors vigorously maintain that Mr. Bettison was an essential, important participant in the case below, and his presence in the case had a very definite impact on the course of the litigation to the detriment of the other guarantors, and

to benefit of NGI. The Court of Appeals made no determination as to Mr. Bettison's status as either an "essential" or "nonessential" party, and did not decide whether simply dismissing Bettison would unduly prejudice the other guarantors. Instead, the court found that "the district court is better placed than the court of appeals to determine whether any party was harmed by the presence of the party that destroyed jurisdiction." 854 F.2d at 924.

Admittedly, there are cases where appellate courts found the authority to dismiss dispensable, nondiverse parties in an effort to maintain federal subject matter jurisdiction. Despite the Seventh Circuit's ruling that it has no such power, its ultimate resolution - to return the case to the district court to determine whether and under what terms it may proceed in federal court - is entirely consistent with the results reached by the other circuits considering this question.

In the cases from the D.C. and Ninth Circuits that NGI relies upon for its argument that a conflict exists, the dispensable and nonessential nature of the party to be dismissed was clear from the record.[1] *E.g.*, *Long v. District of Columbia*, 820 F.2d 409, 417 (D.C. Cir. 1987) (no claim that jurisdictional error had prejudicial effect on other defendants); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524 (9th Cir. 1987) (nondiverse party was clearly nonessential to principal action because all claims against it had been settled); *Othman v. Globe Indemnity Co.*, 759 F.2d 1458, (9th Cir. 1985) (dismissal of

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[1] While the courts in these cases were examining the essential nature of the nondiverse parties using the standards of Fed. R. Civ. P. 19, their deliberations centered around the prejudicial effect, if any, that dismissal would have on the posture of the case on appeal. Thus, it is apparent that those courts of appeals were examining the issue of prejudice and essentiality in a fashion that would have led them to the same result reached here by the Seventh Circuit.

nondiverse "Doe" defendants appropriate where there was no evidence of the existence of such defendants at the time action was removed to federal court and no actual persons ever joined as substitutes for the Doe defendants); *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 457 (9th Cir. 1980) (nondiverse party uninvolved in pertinent count of the complaint); *Fidelity & Casualty Co. v. Reserve Insurance Co.*, 596 F.2d 914 (dismissal of United States appropriate because its own claim had been settled and it had no interest in the remaining claims); *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302, 304 (9th Cir. 1987) (dismissal not allowed where such action is more than technical).

Similarly, the result here does not conflict in principle with results reached by the Second Circuit. *See Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189, 192 (2d Cir. 1984) (waste of judicial resources to remand where district court would "undoubtedly" grant Rule 15(a) motion to amend); *Rock v. Coombe*, 694 F.2d 908, 914 n. 5 (2d Cir. 1982) (remand would have been appropriate if *habeas* petitioner had not clearly and unambiguously abandoned his unexhausted claims).

If this were an instance where, but for the perceived absence of power to dismiss a nondiverse party, the *en banc* panel would have decided whether Mr. Bettison was essential to the result reached by the district court, then a clear conflict between the circuits warranting this Court's attention would exist. In its present posture, however, even if this Court were to decide that a court of appeals *may* dismiss a nondiverse party to retain jurisdiction, the Seventh Circuit still would not be in a proper position to determine whether the extent of Mr. Bettison's participation in the litigation would preclude the exercise of that discretion. As the concurring circuit judge noted:

> Here, . . . the issue is whether Bettison can be dropped without unfair prejudice to the remaining defendants. The district court is inherently better qualified to address this concern - acquainted as it is with all the practical baggage of the ongoing case - than we who must view matters from afar.

854 F.2d at 927. This Court should also let the district court first make that decision and await a more direct conflict.

Another reason not to intervene in the remand of this case to the district court is the fact that the district court has not had a chance to determine whether Fed. R. Civ. P. 21 may be used at any time to dismiss a nondiverse party in an ongoing proceeding. The Seventh Circuit did not consider this issue because the district court was never asked to use Rule 21. 854 F.2d at 925. In view of the likely dispute over whether Rule 21 can be used for this purpose at all, see Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts"), this Court should wait until the record has been more fully developed and considered by the lower courts.

II

THE DISPOSITION OF THIS CASE IS CONSISTENT WITH THIS COURT'S DECISIONS ON THE PROPER ADMINISTRATION OF THE FEDERAL COURTS

The Court of Appeal's resolution of this question affecting its subject matter jurisdiction is quite reasonable in light of this Court's precedent. The Seventh Circuit properly declined to manufacture jurisdiction for itself by dismissing Bettison because a court of appeals "may not in any case, even in the interest of justice, extend its jurisdiction where none exists. . . ." *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988).

Further, remand was the proper course of action to take. As this Court held in *American Fire & Cas. Co.*

v. Finn, 341 U.S. 6, 18 (1951), where diversity jurisdiction does not exist at the time of judgment, the judgment must be vacated and the questions of whether the nondiverse party can be dismissed and whether judgment can be entered without new proceedings are for the consideration and decision of the district court.

Contrary to NGI's argument, the Seventh Circuit's ruling does not mean that in every appeal, where jurisdiction is defeated by the presence of a nondiverse party, the case must be remanded to the district court for new proceedings. Certainly that procedure is appropriate here, but it is not mandated. As the *en banc* panel noted, there may be instances where a party may be dismissed in the court of appeals, for example, where a nominal party is dismissed or a real party in interest is substituted for a nominal party. 854 F.2d at 920.

NGI calls the Seventh Circuit's readingof 28 U.S.C. § 1653 "cramped." NGI fails to note, however, that no court has ever held that Section 1653 empowers an appellate court to add or drop parties. *See* 854 F.2d at 922. Moreover, the distinction drawn in the decision between "creating jurisdiction retroactively" and correcting "defective allegations of jurisdiction" could not be clearer. The facts of the case either present federal jurisdiction or they do not. An amendment may be allowed to *clarify* the pleadings, but not to change the facts of the case.

NGI's observation that the decision below represents a "sharp inconsistency" with *Mullaney v. Anderson*, 342 U.S. 415 (1952), is also inaccurate. While the Court allowed the *addition* of parties to remove any doubt as to the petitioner's standing to maintain the suit, the Court *never* held that it lacked jurisdiction. Indeed, jurisdiction did exist as the case was originally presented. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Mullaney is instructive, however, for another reason. Before the addition of parties was allowed, this Court first

determined that "the addition of these two parties plaintiff can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation." 342 U.S. at 417. This is precisely the determination that the Seventh Circuit found that it was not in a position to make.

The Court of Appeals has responded to the mandate in *American Fire & Cas. Co.*, and the principle announced in *Colt Industries Operating Corp.*, and has resolved this case accordingly. There simply are no unresolved questions as to how a court of appeals should resolve a jurisdictional problem of this sort.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANK K. HEAP
CHARLES G. ALBERT*
FREDRIC A. COHEN

BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Respondent

* *Counsel of Record*

Dated: December 7, 1988

REPLY

BRIEF

No. 88-774

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

NEWMAN-GREEN, INC.,

Petitioner,

v.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

PHIL C. NEAL*
208 South LaSalle Street
Chicago, Illinois 60604
(312) 269-8000

Attorney for Petitioner

*Counsel of Record

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Chicago, Illinois 60604

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The Brief in Opposition erroneously re-states the question presented as whether the appellate court is "compelled" to dismiss the nonessential [i.e. non-indispensable] nondiverse party. That, of course, is not the issue raised by the Seventh Circuit's decision or by the Petition for Certiorari. The question is solely whether the appellate court has the *power* to dismiss in appropriate circumstances.

The decision of the Seventh Circuit clearly and unequivocally holds that the court lacks power. See, e.g. the court's statement (Petition, A-13): "Having determined that the district court lacked jurisdiction of this case and that we are powerless to cure this lack . . ."

It is equally clear that that holding is squarely in conflict with the cases in other circuits, cited in the Petition and in the dissenting opinion below, that have not only concluded that the appellate court does have such a power but have proceeded to *exercise* the power.

Respondent appears to be arguing that the "results" in those cases are not in conflict with the "result" in the instant case because on the facts of this case those other courts might have declined to exercise the power to cure jurisdiction. Such speculation cannot eliminate the conflict. The conflict is as to the existence of power in the court of appeals, not the manner of its exercise. Since such a power *was* exercised in the other cases, their "results" are in direct conflict with the decision in this case.

Respondent also appears to be suggesting that resolution of the issue is unimportant because the Seventh Circuit might still decide to remand the case to the district court, as a matter of discretion, even if this Court were to hold that the court of appeals does have power to dismiss the nonessential party. That is necessarily true, since the Petition does not ask this court to address the question whether the court of appeals should exercise the power in this case. It only asks that the error of law be corrected. The decision below does not rest on alternative grounds; it clearly rests on the lack of power. The majority opinion does suggest that a district court is in a better position generally to decide whether the presence of a nondiverse party has caused prejudice, but advances that as a reason buttressing the court's conclusion that a court of appeals lacks power. It cannot be assumed that if this Court were to hold that conclusion to be erroneous, the

Seventh Circuit would nevertheless insist on setting aside the well-reasoned judgment of the original panel that Bettison's presence in the case had not caused any "prejudice" of which the other defendants were entitled to complain. (Petition, B-5, 6.)

In any event, the possibility that the Seventh Circuit might ultimately decline to dismiss Bettison on discretionary grounds does not lessen the importance of resolving the issue of appellate-court authority that is squarely presented, both because of the conflicting views of the courts of appeals and because of the significance of that jurisdictional question to the efficient functioning of the federal court system.

Respectfully submitted,

PHIL C. NEAL
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000
Attorney for Petitioner

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604

JOINT

APPENDIX

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-774

In the Supreme Court of the United States

October Term, 1988

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JOINT APPENDIX

PHIL C. NEAL*
MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Chicago, IL 60604
(312) 269-8000

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, IL 60604
(312) 443-0700

Attorneys for Petitioner

FRANK K. HEAP
CHARLES G. ALBERT*
FREDRIC A. COHEN
BELL, BOYD & LLOYD
Three First National Plaza
Chicago, IL 60602
(312) 372-1121

Attorneys for Respondents

* Counsel of Record

Petition For Certiorari Filed October 25, 1988
Certiorari Granted January 9, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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The following Opinions have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the printed Petition for a Writ of Certiorari:

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Opinion of the United States Court of Appeals for the Seventh Circuit, dated October 28, 1987	B-1
Opinion of the United States Court of Appeals for the Seventh Circuit, dated August 11, 1988	A-1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States District Court
for the Northern District of Illinois

Civil Action No. 82 C 7933

Date	*Filing/Proceeding*
12/28/82	Complaint for Breach of Guaranty Agreement.
2/ 8/83	U.S. Marshal's return of service of summons and complaint returned served as to Rafael Tudela on 1/15/83; Alberto Tudela on 1/15/83; Irene Larrain de Caplan on 1/15/83; Alejandro Alfonzo-Larrain, R. on 1/15/83; and William L. Bettison on 1/15/83.
3/ 4/83	Defendants' Motion to Dismiss or to Quash Service of Summons.
3/17/83	Defendants' Memorandum in Support of Motion to Quash Service of Summons.
4/ 8/83	Plaintiff's Memorandum in Opposition to Defendants' Motion to Quash Service of Summons.
4/19/83	Memorandum Opinion and Order entered: Defendants' Motion to Quash Service of Process is denied without prejudice.
5/31/83	Answer of Defendants Rafael Tudela, Alberto Tudela, Irene Larrain de Caplan, Alejandro Alfonzo-Larrain, R., and William L. Bettison to the Complaint.
6/21/83	Plaintiff's Motion to Strike Third Affirmative Defense.
6/21/83	Newman-Green de Venezuela's Motion to Intervene and to file Answer and Counterclaim.
7/ 5/83	Plaintiff's Response to Motion of Newman-Green de Venezuela for Leave to Intervene and to file Answer and Counterclaim.

Date	*Filing/Proceeding*
7/15/83	Minute Order entered: Newman-Green de Venezuela's Motion for Leave to Intervene and to file Answer and Counterclaim is granted.
7/15/83	Answer of Intervenor-Defendant Newman-Green de Venezuela to the Complaint.
7/15/83	Intervenor-defendant Newman-Green de Venezuela's Counterclaim.
11/17/83	Minute Order entered: Plaintiff is granted leave to file an Amended Complaint.
11/18/83	Plaintiff Newman-Green, Inc.'s Motion to Amend Complaint and to add additional party-plaintiff.
11/18/83	Amended Complaint of Plaintiffs Newman-Green, Inc. and Arnel, Inc.
11/18/83	Plaintiff Newman-Green, Inc.'s Answer to Counterclaim of Newman-Green de Venezuela.
12/ 8/83	Answer to Defendants Rafael Tudela, Alberto Tudela, Irene Larrain de Caplan, Alejandro Alfonzo-Larrain, R., William L. Bettison, and Newman-Green de Venezuela to the Amended Complaint.
4/ 3/84	Motion of Defendants Alejandro Alfonzo-Larrain, R., Irene Larrain de Caplan, Rafael Tudela, Alberto Tudela, William L. Bettison, and Newman-Green de Venezuela for Leave to File Instanter Amended Counterclaim and Affirmative Defenses and Third Party Complaint.
4/ 3/84	Minute Order entered: Defendants' Motion for Leave to File Amended Counterclaim and Affirmative Defenses is granted. Defendants' Motion for Leave to File Third Party Complaint is withdrawn.
4/ 3/84	Defendant Newman-Green de Venezuela's Amended Counterclaim.

Date	*Filing/Proceeding*
4/ 3/84	Defendants' Amended Affirmative Defenses.
4/18/84	Plaintiff Newman-Green, Inc.'s Reply to Newman-Green de Venezuela's Amended Counterclaim.
4/23/84	Motion of Plaintiff and Counter-defendant Newman-Green, Inc. to Dismiss Newman-Green de Venezuela's Amended Counterclaim and for Judgment on the Pleadings.
6/ 1/84	Plaintiff's Memorandum in Support of Motion to Dismiss Counts IV and VII of Newman-Green de Venezuela's Amended Counterclaim.
6/11/84	Defendants' Response to Plaintiff's Motion to Dismiss Counts IV and VII of Newman-Green de Venezuela's Amended Counterclaim.
6/20/84	Plaintiff's Reply Memorandum in Support of Motion to Dismiss Counts IV and VII of Newman-Green de Venezuela's Amended Counterclaim.
7/23/84	Exhibit A (License Agreement).
8/ 3/84	Memorandum Opinion and Order entered: Motion of Newman-Green, Inc. to Dismiss Count IV of the Amended Counterclaim is granted and that Count is dismissed without prejudice. Motion to dismiss Count VII of the Amended Counterclaim is denied.
8/24/84	Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Amended Complaint.
9/17/84	Defendants' Brief in Support of Motion for Summary Judgment on Count I of Plaintiffs' Amended Complaint.
9/17/84	Exhibits to Defendants' Brief in Support of Motion for Summary Judgment on Count I of Plaintiffs' Amended Complaint.

Date	*Filing/Proceeding*
11/26/84	Plaintiff Newman-Green, Inc.'s Memorandum in Opposition to Defendants' Motion for Summary Judgment on Count I of the Amended Complaint.
11/26/84	Plaintiff Newman-Green, Inc.'s Appendix to Memorandum in Opposition to Defendants' Motion for Summary Judgment on Count I of the Amended Complaint.
1/16/85	Defendants' Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment on Count I of the Amended Complaint.
2/27/85	Memorandum Opinion and Order entered: Defendants' Motion for Summary Judgment on Count I of the Amended Complaint is denied.
3/22/85	Plaintiff Newman-Green, Inc.'s Motion for Leave to File Second Amended Complaint.
3/22/85	Plaintiff Newman-Green, Inc.'s Motion for Partial Summary Judgment on Count I of the Amended Complaint.
3/29/85	Plaintiff Newman-Green, Inc.'s Memorandum in Support of Motion for Partial Summary Judgment on Count I of the Amended Complaint.
3/29/85	Plaintiff Newman-Green, Inc.'s Appendix to Memorandum in Support of Motion for Partial Summary Judgment on Count I of the Amended Complaint.
3/29/85	Plaintiff Newman-Green, Inc.'s Memorandum in Support of Motion for Leave to File Second Amended Complaint.
3/29/85	Plaintiff Newman-Green, Inc.'s Appendix to Memorandum in Support of Motion for Leave to File Second Amended Complaint.
3/29/85	Defendants' Response to Plaintiff's Motion for Leave to File Second Amended Complaint.

Date	*Filing/Proceeding*
4/ 5/85	Minute Order entered: Leave is granted to file amendment to Complaint constituting the Second Amended Complaint.
4/10/85	Plaintiffs' Second Amended Complaint.
5/ 6/85	Defendants' Answer to Plaintiffs' Second Amended Complaint.
5/20/85	Defendants' Response to Plaintiff Newman-Green, Inc.'s Motion and Memorandum for Partial Summary Judgment on Count I of the Amended Complaint.
6/ 3/85	Plaintiff Newman-Green, Inc.'s Reply Memorandum in Support of Motion for Partial Summary Judgment on Count I of the Amended Complaint.
6/26/85	Memorandum Opinion and Order entered: There is no genuine issue of fact as to the liability of Alfonzo-Larrain, R., Irene Larrain de Caplan, Rafael Tudela, Alberto Tudela, and William Bettison on Count I, and Newman-Green, Inc. is entitled to a judgment as to liability on that count as a matter of law. The amount of that liability is to be calculated according to the bolivar-dollar exchange rate in effect on the date of the aforesaid defendants' breach.
1/31/86	Clerk's file copy of transcript of proceedings had before the Honorable Milton I. Shadur on 3/22/85 and 4/5/85 filed by the Official Court Reporter.
3/ 6/86	Defendants' Motion for Entry of Agreed Protective Order.
3/ 6/86	Minute Order entered: Defendants' Motion for Entry of Agreed Protective Order is granted.
3/ 6/86	Agreed Protective Order.
7/ 9/86	Plaintiffs' Motion for Stay of Counts V and VI of the Second Amended Complaint.

Date	*Filing/Proceeding*
7/ 9/86	Plaintiff Newman-Green, Inc.'s Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
7/ 9/86	Plaintiff Newman-Green, Inc.'s Supplement to Statement of Undisputed Facts filed in Support of Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
7/10/86	Plaintiff Newman-Green, Inc.'s Memorandum in Support of Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
7/21/86	Plaintiffs' Memorandum in Support of Motion for Stay of Counts V and VI of the Second Amended Complaint.
7/30/86	Defendants' Memorandum in Opposition to Plaintiffs' Motion for Stay of Counts V and VI of the Second Amended Complaint.
7/30/86	Defendants' Memorandum in Opposition to Plaintiff Newman-Green, Inc.'s Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
7/30/86	Defendants' Statement of Genuine Issues of Material Fact in Opposition to Plaintiff Newman-Green, Inc.'s Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
8/19/86	Corrected Copy of Defendants' Statement of Genuine Issues of Material Fact in Opposition to Plaintiff Newman-Green, Inc.'s Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
8/22/86	Plaintiffs' Reply Memorandum in Support of Motion for Stay of Counts V and VI of the Second Amended Complaint.

Date	*Filing/Proceeding*
8/22/86	Plaintiff Newman-Green, Inc.'s Reply Memorandum in Support of Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint.
9/ 5/86	Defendants' Motion for Summary Judgment On, or Alternatively to Dismiss, Counts V and VI of the Second Amended Complaint.
9/ 5/86	Defendants' Memorandum in Support of Motion for Summary Judgment On, or Alternatively to Dismiss, Counts V and VI of the Second Amended Complaint.
9/ 5/86	Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment on Counts V and VI of the Second Amended Complaint.
9/30/86	Plaintiff Newman-Green, Inc.'s Memorandum in Opposition to Defendants' Motion for Summary Judgment On, or Alternatively to Dismiss, Counts V and VI of the Second Amended Complaint.
9/30/86	Plaintiff Newman-Green, Inc.'s Statement of Genuine Issues of Material Fact in Opposition to Defendants' Motion for Summary Judgment on Counts V and VI of the Second Amended Complaint.
10/ 6/86	Defendants' Reply Memorandum in Support of Motion for Summary Judgment On, or Alternatively to Dismiss, Counts V and VI of the Second Amended Complaint.
12/17/86	Memorandum Opinion and Order entered: On Count I Newman-Green, Inc. is entitled to a judgment against defendants in the sum of $207,908.86 plus 5% per annum prejudgment interest beginning January 31, 1980; Count IV is dismissed without prejudice to plaintiff's

Date	*Filing/Proceeding*
	possible assertion, in a court of competent jurisdiction, of a tort claim again defendants for Newman-Green de Venezuela's post-November 1, 1979 manufacture and sale; defendants are dismissed from (rather than being awarded summary judgment on) Counts V and VI; plaintiffs' motion for stay of Counts V and VI is denied. Setting briefing schedule on one remaining issue: possible issuance of Rule 54(b) determination as to Count I.
12/31/86	Plaintiff Newman-Green, Inc.'s Submission in Support of Rule 54(b) Determination on Count I of the Second Amended Complaint.
12/31/86	Defendants' Memorandum in Opposition to Rule 54(b) Certification.
1/ 5/87	Supplement to December 17, 1986 Memorandum Opinion and Order entered: This Court expressly determines that there is no just reason for delay and expressly directs entry of final judgment on Count I, the dismissal of the asserted contract claims in Counts IV, V and VI as to the Count I defendants on the merits and the dismissal of any potential tort claims under Counts IV, V and VI against those defendants for lack of personal jurisdiction over them. These determinations dispose of all plaintiff's claims in this action against those defendants.
1/ 5/87	Judgment entered pursuant to Rule 58.
2/ 4/87	Plaintiff Newman-Green, Inc.'s Notice of Appeal.
5/19/87	Satisfaction of Judgment on Count I of the Second Amended Complaint.
11/ 3/88	Certified copy of August 11, 1988 Order of the Court of Appeals: "On consideration whereof, it is ordered and adjudged by this Court that

Date	*Filing/Proceeding*
	the judgment of the District Court is vacated and the cause is remanded to the District Court, with no costs in this Court, in accordance with the opinion of this Court filed this date.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Seventh Circuit

No. 87-1195

Date	*Filing/Proceeding*
4/ 6/87	Plaintiff-Appellant's Brief.
4/ 6/87	Plaintiff-Appellant's Appendix.
5/ 6/87	Defendants-Appellees' Brief.
5/20/87	Appellant's Reply Brief.
9/24/87	Appellant's Motion for Leave to Amend and to Dismiss Appellee Bettison.
9/24/87	Appellant's Supplemental Brief on Subject Matter Jurisdiction and in Support of Motion for Leave to Amend and Dismiss Appellee Bettison.
9/24/87	Appellees' Suggestion that the Court Lacks Subject Matter Jurisdiction.
10/28/87	Opinion and Order entered: Final judgment—the guarantors are required to compensate Newman-Green, Inc. for 5% of Newman-Green de Venezuela's net sales of valves made with Newman-Green, Inc.'s technology for as long as Newman-Green de Venezuela sells the valves (but not later than 1994), unless they have some additional defense that the district court did not discuss. The cause is remanded for trial on the question whether Venvalvex is an alter ego of Newman-Green de Venezuela. Bettison is dismissed as a party, with prejudice. The district court already has liquidated Newman-Green, Inc.'s claim for the period November 1979 through July 1980, so only the activities thereafter require further proceedings on either liability or damages, unless there are unadjudicated defenses. No costs.

Date	*Filing/Proceeding*
12/ 2/87	Appellees' Petition for Rehearing with Suggestion that Rehearing be En Banc.
12/ 4/87	Clerk's copy of letter to Appellant requesting 25 copies of its Answer to Appellee's Petition for Rehearing En Banc.
12/18/87	Appellant's Answer to Appellees' Petition for Rehearing En Banc.
2/ 8/88	Order entered: Opinion filed is vacated, and the case is set for rehearing en banc.
8/11/88	Opinion of court by Judge Posner entered (Cudahy concurring; Easterbrook, Flaum, Kanne, dissenting): Vacated and remanded.
8/11/88	Order entered: Final Judgment; vacated and remanded; no costs on appeal.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1195

NEWMAN-GREEN, INC., an Illinois corporation,

Plaintiff-Appellant,

v.

ALEJANDRO ALFONZO-LARRAIN, R., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 7933—Milton I. Shadur, Judge Presiding.

PETITION FOR REHEARING WITH
SUGGESTION THAT REHEARING BE EN BANC

FRANK K. HEAP
CHARLES G. ALBERT
BELL, BOYD & LLOYD
Three First National Plaza
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Defendants-Appellees

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IN THE
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Plaintiff-Appellant,
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ALEJANDRO ALFONZO-LARRAIN, R., et al.,
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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 7933—Milton I. Shadur, Judge Presiding.

PETITION FOR REHEARING WITH SUGGESTION THAT REHEARING BE EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Circuit Rule 40, defendants-appellees, Alejandro Alfonzo-Larrain, Irene Larrain de Caplan, Alberto Tudela and Rafael Tudela (hereinafter jointly referred to as "guarantors")[1], hereby petition this Court

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[1] William L. Bettison, one of the original defendants and appellees, has been dismissed from the case with prejudice by order of this Court. Mr. Bettison takes no part in this petition for rehearing.

for rehearing, and suggest that rehearing be *en banc*. Guarantors present the following three questions to the Court:

[2] 1. Whether a federal court can retroactively invest itself with subject matter jurisdiction by dismissing a non-diverse party in a suit brought under the provisions of 28 U.S.C. § 1332(a)(2);

2. Whether the guarantors will be deprived of due process in violation of the United States Constitution if the case proceeds against them without entirely new evidentiary proceedings;

3. Whether the Court misapprehended the nature of the guaranty agreement in question when it ruled that the parties did not intend the guaranty to vary Illinois common law.

The first question is of "exceptional importance," thereby necessitating a rehearing *en banc*, because it has profound implications for this Court's future considerations of its subject matter jurisdiction. The Court's ruling that it had the power to dismiss Mr. Bettison, a non-diverse party, even after final judgment had been entered, in order to achieve diversity retroactively, is the first such holding in this Circuit. This decision conflicts with the United States Supreme Court decision in *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*, 111 U.S. 379, 381-82 (1884), and is contrary to this Court's opinions in *American Nat'l Bank & Trust Co. v. Bailey*, 750 F.2d 577, 585 (7th Cir. 1984); *Denberg v. Railroad Retirement Bd.*, 696 F.2d 1193, 1197 (7th Cir. 1983); and *Illinois v. General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982).

[3] The second question is of "exceptional importance" not only because of its potential impact on this Court's future exercise of subject matter jurisdiction but also because of its Constitutional implications. Inclusion of Mr. Bettison in the case throughout the discovery phase adversely affected the guarantors' preparation and presentation of their defense to this action. The Court's failure to dismiss the case as to all the guarantors or to require new evidentiary proceedings is in violation of their constitutional rights to procedural due process.

I.

SUMMARY OF FACTS

This appeal was taken by Newman-Green, Inc. ("NGI") from a judgment dismissing its claim for recovery for certain damages under a guaranty agreement entered into by the guarantors and Mr. Bettison. Guarantors are all Venezuelan Citizens; Mr. Bettison is a U.S. citizen residing in Venezuela. (A. 7 at 5, ¶ 10)

The signatories to the agreement guaranteed the payment of an amount of money up to the 5% royalty set forth in a separate license agreement between NGI and Newman-Green de Venezuela ("NGV"). The district court ruled that guarantors and Mr. Bettison were liable only for payments during "the period of time specified in the license agreement," as expressly stated in the guaranty, and further, that the period ended when NGI gave its notice of termination. (SA. 1 p.18)

[4] On appeal, this Court reversed, holding that, under Illinois common law, guarantors were liable for royalty payments for as long as NGI's technology was used. (Slip

Op. 10) The Court reached its decision, however, only after Mr. Bettison, a non-diverse party, was dismissed from the case. (Slip Op. 4) ("There is an obstacle to reaching [the substantive] issue, however: subject matter jurisdiction. We haven't any").

II.

EXERCISING RETROACTIVE JURISDICTION WAS CONTRARY TO LAW AND EQUITY

As the Court noted, because Mr. Bettison is "stateless", the "'complete diversity' rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), requires us to dismiss the whole case." (Slip Op. 4-5) The Court nevertheless went on to exercise jurisdiction over the appeal by inviting and then allowing NGI to dismiss Mr. Bettison pursuant to 28 U.S.C. § 1653 and Fed. R. Civ. P. 21, and on the strength of cases such as *Publiker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cr. 1979); and *Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189, 191-92 (2d Cir. 1984). (Slip Op. 5) In effect, the Court, devoid of subject matter jurisdiction at the time NGI's motion was presented to it, entertained a substantive motion designed to grant itself jurisdiction retroactively.

Guarantors respectfully submit that retroactive jurisdiction cannot be based upon either the statute, the rule or the decisional law referred to in the Court's decision. Further, [5] guarantors suggest that, even if the exercise of retroactive jurisdiction were appropriate in some instances, the circumstances of this case required dismissal of the entire action.

A.

Federal Courts Cannot Exercise Retroactive Jurisdiction

"It is a fundamental precept that federal courts are courts of limited jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Federal courts only have the power that is authorized by Article III of the Constitution and statutes enacted pursuant thereto by Congress. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-180 (1803). When, as here, no provision of the Constitution or any statute allows the exercise of retroactive jurisdiction, the reviewing court has appellate jurisdiction "not of the merits" but merely to dismiss the suit. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 1331 (1986).

NGI purported to base federal court jurisdiction for its action on 28 U.S.C. § 1332.[2] Because Mr. Bettison was not a citizen of any state of the United States or of any foreign state, no jurisdiction existed under that statutory provision. [6] NGI's attempt to cure this jurisdictional defect through a motion to dismiss Mr. Bettison pursuant to 28 U.S.C. § 1653 should not have been allowed. Section 1653 merely provides a method for curing defective *alle-*

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[2] Section 1332(a) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the some or value of $10,000 . . ., and is between . . . citizens of a State and citizens or subjects of a foreign state . . . . (paragraph structure omitted).

gations of jurisdiction not defective jurisdiction.[3] That provision "is not to be used to create jurisdiction retroactively where it did not previously exist." *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986). *See also Pressroom Unions, Etc. Fund v. Continental Assur. Co.*, 700 F.2d 889, 893 (2d Cir. 1983) (Section 1653 does not provide a remedy for defective jurisdiction itself).

The Court's reliance on Fed. R. Civ. P. 21 was similarly misplaced. Although, if read literally, Rule 21 might appear to contemplate the dismissal of a non-diverse party under the theory that he had been misjoined, that rule cannot be used to create retroactive jurisdiction "since it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 370; *see also* Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein").

Despite the lack of statutory authority or applicable rule, many Circuits have nevertheless held that jurisdiction in diversity cases where a non-diverse party can be retained through [7] the simple expedient of dismissing the non-diverse party. *See, e.g., Caspary v. Louisiana Land & Exploration Co.*, 725 F.2d 189, 191-92 (2d Cir. 1984); *Fritz v. American Home Shield Corp.*, 751 F.2d 1152, 1154 (11th Cir. 1985). Indeed, in *Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 n.3 (9th Cir. 1987), the Ninth Circuit condoned this practice even though it recognized that "[c]onferring jurisdiction retroactively is a curious idea. Knowledgeable judges have said that it cannot be done. *E.g. Denberg v. United States R.R. Retirement Board*, 696 F.2d 1193, 1197 (7th Cir. 1983) (Posner, J.)."

[3] Section 1653 reads as follows:

Amendment of pleadings to show jurisdiction. Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Before the decision in this case, however, this Court had refused to recognize or exercise retroactive jurisdiction. *See American Nat'l Bank & Trust Co. v. Bailey*, 750 F.2d 577, 585 (7th Cir. 1984) (questioning the viability of conferring jurisdiction retroactively); *Denberg*, 696 F.2d at 1197 (7th Cir. 1983) ("Jurisdiction cannot be obtained retroactively"); *Illinois v. General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982) ("Finally, technicality though it may be, there is considerable doubt, to say the least, whether a federal court can acquire jurisdiction retroactively"); but cf. *Stockman v. LaCroix*, 790 F.2d 584, 587 (7th Cir. 1986) (" . . . diversity jurisdiction may be saved by the dismissal of non-diverse parties") (dictum).

To the extent that the courts have recognized the power of retroactive jurisdiction, that is, the power to perfect jurisdiction after judgment, those cases are contrary to the decision in *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. [8] 379, 381-82 (1884). In *Swan* the Court considered whether it and the court below could exercise jurisdiction over a case where the requisite diversity did not exist at the time the suit was filed although it was later perfected. After a review of its own precedent, the Court found that it could not exercise jurisdiction retroactively obtained and held that the judgment below had to be reversed. 111 U.S. at 386.

To the same effect is the decision in *Owen Equipment & Erection Co. v. Kroger*. There the Court wrote:

> The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. Yet under the reasoning of the Court of Appeals in this case, a plaintiff could defeat the statutory requirements of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead non-diverse defendants.

437 U.S. at 374. Although *Kroger* dealt primarily with the use of pendent jurisdiction to sidestep the diversity requirements, the case is instructive because the Supreme Court's determination turned on the fact that the plaintiff was doing in two steps what she could not have done in one. Here, NGI is trying to enjoy the benefits of Mr. Bettison's presence throughout the case all the way up to judgment, only to have him dismissed at the appellate level as a non-diverse, dispensable party. Because appellate jurisdiction cannot be altered by subsequent events, the judgment should be reversed and the case against guarantors dismissed.[4]

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[4] Although the Supreme Court in *Horn v. Lockhart*, 84 U.S. (17 Wall) 570, 579 (1873), affirmed the lower court's dismissal of two non-diverse, dispensable parties in order to perfect jurisdiction, that dismissal had taken place before judgment was entered. Where judgment has been entered, however, an appellate court has "no jurisdiction except for the purpose of reversing the decree appealed from, on that ground." *Mansfield, Coldwater & Lake Michigan Ry.*, 111 U.S. at 382-83.

[9] B.

Guarantors Were Unduly Prejudiced By Mr. Bettison's Presence In The Case

The fiction that a federal court may vest itself with "retroactive" jurisdiction has some use perhaps at the district court level, during the early stages of the litigation, where jurisdiction over a diversity case is retained by dismissing any non-diverse parties. *Cf. Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d at 1523 (In Ninth Circuit "practicality prevails over logic" in allowing dismissal of non-diverse party). In those instances, if a court were to dismiss the case without prejudice, plaintiff would in all likelihood be given leave to file a second complaint that did not name the non-diverse party. Notions of judicial economy and efficiency may very well support the elimination of the middle step of dismissing the initial complaint. A different question is presented, however, where substantial discovery has been conducted, a trial concluded and an appeal taken. As the case proceeds, the likelihood that the presence of the non-diverse defendant will prejudice the other defendants increases. By the time the case reaches the appellate court, the non-diverse party will almost certainly have had a substantial impact on the posture of the case. Such was the result here.

[10] The Court held that Mr. Bettison's presence in the district court "did not affect the conduct of the litigation." (Slip Op. 5) The record, however, is to the contrary. Virtually the sole basis for the district court's determination of liability was from the testimony of Mr. Bettison and from documents that Mr. Bettison produced. See, e.g.,

R. C95, C97, C98, C108. None of the other guarantors had access to such materials and no other person was deposed in this litigation. In short, without Mr. Bettison, NGI had little prospect of proving its case. Guarantors were therefore clearly affected to their detriment by Mr. Bettison's presence and NGI profited enormously.

A similar situation was presented in *Kanzelberger v. Kanzelberger,* 782 F.2d 774 (7th Cir. 1986). There the court determined a non-diverse plaintiff could not be dropped from the case after judgment in order to perfect jurisdiction. The court wrote:

> Having enjoyed whatever trial advantage he got from joining the [non-diverse] corporation with him . . . [plaintiff] cannot now turn around and drop his co-plaintiff retroactively in order to cure the jurisdictional defect and confirm his victory on the merits . . .

Id. at 779. Pursuant to the teachings of *Kanzelberger,* having enjoyed the advantage of Mr. Bettison's presence, NGI should not be allowed to confirm its victory by merely dropping Bettison from ~~the action~~. This suit must be dismissed in its entirety.

[11] III.

GUARANTORS' RIGHTS TO DUE PROCESS WILL BE VIOLATED BY THE CURRENT RULING

The prejudice that guarantors suffered from the inclusion of Mr. Bettison as a party throughout this litigation will rise to the level of a due process violation if the current ruling of this Court is not modified and the evidence provided by Mr. Bettison continues to be used against the guarantors. Under the familiar two-part analysis, a due process violation occurs if guarantors have been deprived

of their protected interest in presenting a proper defense of their own unfettered choice and are not allowed to have their liability adjudged in judicial proceedings conducted with only the proper parties before the court. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982) (Court must determine whether party was deprived of a protected interest and, if so, what process was due).

The United States Supreme Court has traditionally held that the Due Process Clause protects civil litigants who seek recourse in the courts, "either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. Further, the Court has held that the Federal Rules of Civil Procedure and related statutes "must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law." *Societe Internationale v. Rogers,* 357 U.S. 197, 209 (1958) (Constitutional limitations applied to use of Fed. R. Civ. P. 37 sanctions).

[12] Under this established doctrine, guarantors therefore must not be deprived of their right to defend their property interests from NGI through an unreasonable use of Fed. R. Civ. P. 21 or the provisions of 28 U.S.C. § 1653. If, however, the case is allowed to proceed as though Mr. Bettison had never been a party, Rule 21 and Section 1653 will have been used to precisely that effect.

As discussed above, Mr. Bettison was the only person in the case to be deposed and NGI's proof depended almost entirely upon evidence received from Mr. Bettison. If Mr. Bettison had not been joined as a party in this suit, instead of using the notice provisions of Fed. R. Civ. P. 30,

NGI would have had to satisfy the requirements of 28 U.S.C. § 1783 in order to obtain evidence from him. Given Mr. Bettison's Venezuelan residence, that might never have been accomplished. Further, it is unlikely that NGV, a Venezuelan corporation that was not a party to the original suit, could have been required to provide NGI with information.

Indeed, guarantors might not have acted to have NGV intervene into the case if the possibility had existed that information within its control would not otherwise have been available to NGI. Instead, Mr. Bettison's presence rendered moot any concern over having NGV intervene into the case because he was knowledgeable of and able to testify to whatever information NGV had. If Mr. Bettison had not been one of the original defendants, guarantors might very well have decided upon a defense [**13**] predicated upon the probability that NGI would not be able to gather evidence to prove its claims.

Obviously, the foregoing analysis is based in part upon speculation. These considerations, however, would almost surely have been taken into account by any reasonable attorney in formulating his client's defense strategy. If guarantors are not given the opportunity to defend against NGI's suit as though Mr. Bettison had never been a party, they will have been irreparably deprived of their constitutional right to present an appropriate defense of their property interests. Notions of "fundamental fairness" require that guarantors be given a reasonable opportunity at a meaningful time to fashion a meaningful defense. *Cf. Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 475 (1985). Accordingly, the judgment against them should

be reversed and new discovery and evidentiary proceedings must be ordered.

IV.

THE COURT MISAPPREHENDED THE GUARANTORS' OBLIGATIONS

The Court ruled that the guarantors are required to compensate NGI for 5% of NGV's net sales of values made with NGI's technology for as long as NGV sells or sold the valves. (Slip Op. 10). This result was reached without regard to the language in the guaranty limiting the guarantors' liability to the period of time specified in the license agreement because, according to the Court, it referred to the "license and guaranty only to show that they are not inconsistent with the standing rule in Illinois [**14**] —one applicable unless varied by contract—that the obligation to pay 'royalties' follows the sale of the items . . ." *Id.* This ruling, however, misapprehends the nature of the guarantors' obligations.

Guarantors were not before the court on a claim of breach of common law duties to pay royalties. Guarantors had submitted to the jurisdiction of courts sitting in Illinois for the limited purpose of giving effect to the guaranty agreement. (SA. 1, pp. 26-27) That guaranty was *not* a blanket, open-ended promise to pay "royalties" for as long as NGI's technology was used. Nor did the guarantors promise to pay "royalties" for as long as Illinois common law might conceivably require NGV to pay for the use of NGI's technology. Instead, guarantors promised *only* to "guarantee the payment . . . of an amount of money up to the 5% royalty *set forth in the license agreement and for the period of time specified in the license agree-*

ment." (emphasis supplied) (A. 3, p. 1) The question of what constitutes "royalties" and for what period of time payment is required must be measured by the language in the relevant agreements and not just the general notions contained in Illinois common law. Contrary to the Court's decision, the guaranty and license agreement do vary from Illinois common law.

The fact that the guarantors' obligations are not co-extensive with Illinois common law was recognized by the Court in its ruling that guarantors' liability could under no circumstances extend beyond 1994, the outside period "specified in the [**15**] license agreement." (Slip Op. 10) If the Court had not recognized this contractual limitation, under the common law, guarantors' liability for "royalties" could theoretically extend beyond 1994 if NGV continued to use NGI's technology.

Logic dictates that if the obligation can be terminated as of 1994, it can also be terminated sooner if the parties so provide—and that is exactly what the parties here have done.[5] The license agreement provided that it could be terminated by NGI upon notice and NGI did precisely that. (A. 4, pp. 5, 13) At a minimum, the case should be remanded to determine whether the parties intended that the guarantors' obligations cease upon NGI's date of notice of termination or continue until the license agreement was completed in accord with all its terms. The record below, however, is clear that the termination is effective simply upon giving 60 days notice (A. 3, p. 13) Accord-

[5] The parties also provided for a definition of "royalties" that differed from Illinois common law. Note the juxtaposition of the terms "royalties" and "damages" in Section XIIIV (sic) of the license agreement. (4 at § XIIV)

ingly, the judgment of the district court ought to be affirmed.

CONCLUSION

For the foregoing reasons, we respectfully request that the foregoing issues be reheard and decided by the Court *en banc*.

Dated this 2nd day of December 1987.

[**16**] Respectfully submitted

/s/ Charles G. Albert
Frank K. Heap
Charles G. Albert
Three First National Plaza
Chicago, Illinois 60602
(312) 372-1121
Attorneys for Defendants-Appellees Alejandro Alfonzo-Larrain, Irene Larrain de Caplan Alberto Tudela and Rafael Tudela

Of Counsel:
BELL, BOYD & LLOYD
Three First National Plaza
Chicago, Illinois 60602
(312) 372-1121

(Certificate of Service omitted in printing)

PETITIONER'S

BRIEF

No. 88-774

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1988

NEWMAN-GREEN, INC.,

Petitioner,

vs.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, AND WILLIAM L. BETTISON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

PHIL C. NEAL*
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000

Attorney for Petitioner

* *Counsel of Record*

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTION PRESENTED

Do the United States courts of appeals have power to permit, on appeal, the dropping of a non-indispensable defendant whose presence destroys complete diversity in order to cure a jurisdictional defect and permit decision of the appeal on its merits?

STATEMENT PURSUANT TO RULE 21.1(b)

The caption of the case in this Court lists all parties to the proceeding in the court of appeals.

STATEMENT PURSUANT TO RULE 28.1

The following corporations are affiliates of Newman-Green, Inc.: Arnel Industries, Inc.; Microlon Corp.; Sau-Tuk Industries, Inc., Twin Lakes Manufacturing, Inc.; and 151 Interstate Road Corp. Newman-Green, Inc. has no parent or subsidiary corporations, other than wholly-owned subsidiary corporations.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the court of appeals on *en banc* rehearing (Pet. App. A1-48)[1] are reported at 854 F.2d 916. The panel opinion which was vacated by the *en banc* decision (Pet. App. B1-10) is reported at 832 F.2d 417. The opinion of the district court (Pet. App. C1-30) and a supplemental opinion and order issued pursuant to Rule 54(b) (Pet. App. D1-3) are unreported. Opinions of the district court at earlier stages of the action are reported at 590 F. Supp. 1083, 605 F. Supp. 793, and 612 F.Supp. 1434.

[1] "Pet. App." refers to the Appendices to the printed Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1988. The petition for certiorari was filed on October 25, 1988. The petition was granted on January 9, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

United States Code, Title 28:

§ 1653. Amendment of pleadings to show jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Federal Rules of Civil Procedure:

Rule 21. Misjoinder and Non-Joinder of Parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

STATEMENT OF THE CASE

This action was brought in 1982 by petitioner Newman-Green, Inc., an Illinois corporation, to recover payments due under a license agreement whereby petitioner had licensed Newman-Green de Venezuela, a Venezuelan corporation, to manufacture aerosol valves using petitioner's trademarks and trade secrets. The complaint named as defendants five individuals who were guarantors of the royalties due under the license. The guaranty was joint and several. Four of the individual defendants were Venezuelans. (Amended Complaint, ¶¶6-9.) The fifth, one Bettison, was alleged to be a United States citizen residing in Venezuela. (Amended Complaint,

¶10.) The jurisdiction of the district court was invoked under 28 U.S.C. § 1332(a)(3), which provides for jurisdiction in actions "between . . . citizens of different States and in which . . . citizens or subjects [of foreign states] are additional parties."

Between 1982 and 1986 there were extensive proceedings in the district court, resulting in a number of opinions dealing with the merits. *See, e.g.*, 590 F.Supp. 1083 (1984), 605 F.Supp. 793 (1985), 612 F.Supp. 1434 (1985). In 1986 the district court entered a partial summary judgment disposing of all claims of petitioner against the guarantors, and directed the entry of final judgment pursuant to the partial final judgment provisions of Rule 54(b) of the Federal Rules of Civil Procedure. (Pet. App. C1-25; D1-3.) The district court's judgment awarded petitioner some $200,000 against the guarantors for unpaid royalties due from the licensee for the period prior to notice of termination of the license, but gave judgment for the guarantors as to amounts due for a subsequent period during which the licensee had continued to manufacture and sell, on the ground that the latter amounts were not "royalties" within the meaning of agreement of guaranty. Petitioner appealed that adverse judgment.

At oral argument a member of the appellate panel noted that subject-matter jurisdiction appeared to be lacking because the complaint did not allege that the defendant Bettison was a citizen of any State. 854 F.2d at 918 (Pet. App. at A2). Neither the parties nor the district court had noted the defect. The panel invited supplemental submissions by the parties, and suggested to petitioner that the defect might be cured by dismissing Bettison as a party. *Id.* In response petitioner filed a motion to dismiss Bettison; the defendant guarantors moved to dismiss the case. Thereafter the panel rendered a unanimous opinion in which it (1) held that because Bettison was "stateless" complete diversity was lacking and jurisdiction could not

be founded on 28 U.S.C. § 1332(a)(3); (2) held that the defect in jurisdiction could be cured by petitioner's dismissal of Bettison as a defendant; and (3) granted petitioner's motion to dismiss Bettison, but specified that the dismissal was with prejudice. 832 F.2d at 420 (Pet. App. at B5-6). The panel went on to decide the merits, reversing the district court and holding that the guarantors were liable for royalties for the period subsequent to the license termination. *Id.* at 422 (Pet. App. at B10).

On rehearing *en banc*, the court in an opinion by Posner, J. held that a court of appeals has no power to dismiss a party in order to retain federal jurisdiction. In reaching that conclusion the court held that 28 U.S.C. § 1653 may not be construed to permit amendments to pleadings that have the effect of creating jurisdiction retroactively, and that neither Rule 21 of the Federal Rules of Civil Procedure nor the concept of inherent power could supply such authority either. However, acknowledging that Rule 21 has long and often been treated as permitting the district courts to remedy a lack of diversity by dismissing a nondiverse party at any stage of a proceeding, the court remanded the case to the district court to decide whether Bettison should be dismissed or whether the case should be dismissed for lack of jurisdiction. 854 F.2d at 926 (Pet. App. at A19).

Three members of the court (comprising the panel that initially heard the appeal) dissented in an opinion by Easterbrook, J. 854 F. 2d at 927-41 (Pet. App. at A21-48). A fourth member of the court, Cudahy, J., filed an opinion concurring in the result reached by the majority. 854 F.2d at 927 (Pet. App. at A20).

SUMMARY OF ARGUMENT

The issue in the case is whether the court of appeals had power to correct a jurisdictional defect by allowing the plaintiff to dismiss a stateless United States citizen defendant who was not an indispensable party, and then proceed to decide the merits of the appeal, or was required to remand and allow the district court to make the decision whether to retain jurisdiction. The court of appeals held that the latter disposition was required because otherwise the appellate court would be creating federal jurisdiction retroactively. That conclusion is illogical and erroneous because it is undisputed that the district courts have power to engage in that limited type of "retroactive creation" of jurisdiction and to do so even after judgment. What the district courts may do cannot be improper for the appellate courts to do as a matter of general principles of federal jurisdiction.

Apart from Section 1653 of the Judicial Code, appellate authority to allow amendments to the pleadings was conferred by Section 32 of the Judiciary Act of 1789 and the authority was held by this Court to include amendments curing jurisdiction. The substance of Section 32 was carried forward until ten years after the adoption of the Federal Rules of Civil Procedure, when it was eliminated by the revisers of the Judicial Code on the assumption that it had been supplanted by the Federal Rules. The power with which the appellate courts were thus endowed from their inception has not been withdrawn. In addition, Section 1653 may and should be construed as enabling the appellate courts to allow amendments perfecting jurisdiction to the same extent as the district courts may do.

No general considerations of policy suggest that a court of appeals should be disabled from allowing the dismissal of a party when it determines that no prejudice can have resulted to the remaining parties by the presence of the party as to whom jurisdiction was lacking.

ARGUMENT

I.

FEDERAL JURISDICTION CAN BE PERFECTED RETROACTIVELY BY DROPPING A NON-INDISPENSABLE PARTY WHOSE PRESENCE DEFEATS THE REQUISITE DIVERSITY.

The opinion of the court of appeals is unclear as to whether the result it reaches is required simply by a lack of appellate power or by a general principle of federal jurisdiction. Although the court finds an absence of appellate power, a theme that pervades the opinion is a theme about the power of federal courts in general–namely, that federal jurisdiction cannot and should not be created retroactively. The opinion opens by stating that the question to be decided is "whether a court of appeals is empowered to dismiss a party in order to retain federal jurisdiction." 854 F.2d at 917 (Pet. App. at A1). The court's fundamental answer to the question appears almost at once (854 F.2d at 918 (Pet. App. at A3)), as follows:

> Protracted proceedings have unfolded in a case over which the district court never acquired jurisdiction. For us now to confer jurisdiction on the district court retroactively to the date of the complaint–to pretend that Bettison never was a party–*would violate the principle that the existence of federal jurisdiction* depends on the facts when the complaint is filed, not on later facts. (Emphasis added.)

But if the action of a court of appeals in dropping a party to preserve jurisdiction violates a "principle of federal jurisdiction," the same action by a district court would also violate the principle. Yet, as the opinion ultimately acknowledges (854 F.2d at 923-25 (Pet. App. at A13-15)), it has been settled by many decisions over many years that a district court, at least, may dismiss at any stage of a proceeding a party whose presence destroys complete diversity. *See* authorities cited *id.*; *see also* dissenting opinion,

854 F.2d at 929-31 (Pet. App. at A23, A27-28). The opinion concedes "some tension" between that principle and the principle stated at the beginning of the opinion, but seeks to reconcile them on the ground that for practical reasons it should be possible to amend rather than starting over when an error is discovered "shortly after a case is filed."[2] 854 F.2d at 924-25 (Pet. App. at A15). But that suggested justification cannot explain why in fact the cases permit such dropping of a party at any stage of a proceeding, as the court concedes they do.

There is not merely "some tension" between the principle thus applied to the district courts and the principle the court below has held must be followed by an appellate court; the two principles are at war with one another. If it does not violate a principle of federal subject-matter jurisdiction for a district court to preserve or create subject-matter jurisdiction by dropping a party, the denial of such power to an appellate court must be based on some reason other than that principle.

The proposition that diversity jurisdiction may be perfected after commencement of the action by dropping a party has an ancient lineage, dating back at least to the decision in *Carneal v. Banks*, 10 Wheat. (23 U.S.) 181 (1825). Indeed, *Carneal v. Banks* appears on its face to be as much an authority for an appellate court as for a trial court to preserve its jurisdiction by dismissing a nondiverse party. The *en banc* opinion below distinguishes *Carneal* as perhaps involving only a "purely technical" defect and as involving at any rate "the power of a district court, not of

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[2] The court's citation of the American Law Institute study as support for this point is puzzling, since the main ALI recommendation on the matter was a proposal for a cut-off of inquiry into subject-matter jurisdiction, just the opposite of a "limited time" in which to cure a jurisdictional defect. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 366-74 (1969).

an appellate court" to save jurisdiction. 854 F.2d at 921 (Pet. App. at A8). Neither distinction is supported by the opinion itself.

The suit was one to rescind a sale of land and obtain title to the land or get damages. It was brought against two sets of heirs, those of the original vendee (the Carneal group) and those of the original owner from whom the plaintiff had purchased the property but against whom he had evidently not perfected his title (the Harvie group). 10 Wheat. (23 U.S.) at 182-83. The trial court awarded the plaintiff damages against the Carneal group, and both the plaintiff and the Carneal defendants appealed. The Carneal defendants assigned as error that the lower court had no jurisdiction because the Harvie heirs were not alleged to be, and were not, of diverse citizenship from the plaintiff. *Id.* at 187. There is no indication in the case as reported that the trial court had dismissed the Harvie defendants. Ruling on the objection to jurisdiction, Chief Justice Marshall said:

> If the validity of this objection, so far as respects Harvie's heirs, be unquestionable, it cannot affect the suit against Carneal's heirs, unless it be indispensable to bring Harvie's heirs before the Court, in order to enable it to decree against Carneal's heirs. This is not the case .... The bill, therefore, as to Harvie's heirs, may be dismissed, without in any manner affecting the suit against Carneal's heirs. That they have been improperly made defendants in his bill, *cannot affect the jurisdiction of the Court as between those parties who are properly before it.* (10 Wheat. (23 U.S.) at 188. Emphasis added.)

The court went on to decide the merits.

Although the opinion says nothing about the respective powers of the trial court and the appellate court, its language seems entirely consistent with the view that the Supreme Court had whatever power the circuit court may have had and was exercising the power by disregarding the

nondiverse defendants and deciding the merits. (Such an assumption of authority would have been quite natural in the light of Section 32 of the Judiciary Act of 1789. *See infra* pp. 10-12.)

The long-standing acceptance of the principle that jurisdiction can be perfected by dismissing a non-indispensable party at any stage of the proceedings is not surprising. It amounts to no more, in effect, than recognizing that where indispensable parties are not involved diversity jurisdiction may exist with respect to "claims" as distinct from a "case." Where problems other than the "complete diversity" rule are involved, no difficulty has been seen in treating separate claims separately for jurisdictional purposes. Thus, where two plaintiffs joined in a single complaint, improperly aggregating their claims for purposes of the requisite allegation of jurisdictional amount, no problem of "creating jurisdiction retroactively" was seen in retaining jurisdiction over one claim while dismissing the other. *See Sarnoff v. American Home Products Corp.*, 798 F.2d 1075 (7th Cir. 1986) (Posner, J.). (In that case the court even indicated that the defect in the second claim might have been curable on appeal under § 1653 of the Judicial Code but for the necessity for factual determinations. *See* 798 F.2d at 1079.)

And, indeed, some courts have found no difficulty in treating claims that resulted in incomplete diversity not as raising problems of "curing defective jurisdiction" but simply as requiring dismissal of the nondiverse claim itself. In *Friend v. Middle Atlantic Transportation Co.*, 153 F.2d 778 (2d Cir.) (Swann, Clark, and Frank, JJ.), *cert. denied*, 328 U.S. 865 (1946), the trial court had given judgment against three defendants, one of whom was a third-party defendant against whom the plaintiff had asserted a nondiverse claim. 153 F.2d at 779. On appeal the court found that there was no jurisdiction as to that defendant, dismissed the judgment against him, and affirmed the

judgment against the others. It said, "[T]here is no reason why, more than in state practice, the disturbance of a judgment against one need affect the judgment against others liable for the full amount awarded." 153 F.2d at 780. *Cf. Camp v. Gress*, 250 U.S. 308 (1919) (reversing judgment against defendant as to whom venue was improper and refusing to reverse judgments against other defendants as to whom jurisdiction and venue were proper).

Once the focus is shifted from "case" to "claims," the rule permitting the dropping of a nondiverse party does not involve retroactive "creation" of jurisdiction at all, but only the lopping off of a severable claim or claims as to which no jurisdiction exists, and retaining a claim or claims over which jurisdiction has existed all along. As said in *Carneal v. Banks*, the joining of the improper party "cannot affect the jurisdiction of the court as between the parties who are properly before it." 10 Wheat. (23 U.S.) at 188.

For the foregoing reasons, preserving or curing diversity jurisdiction by dropping a party after extended proceedings in a case violates no fundamental precept of federal jurisdiction. To the extent that the decision below rests on a contrary premise it is erroneous, we submit, and the real issue, as the dissenting opinion argues, is simply whether an appellate court may ever exercise the power in question.

II.

THERE IS NO DIFFICULTY IN LOCATING A SOURCE OF POWER IN THE APPELLATE COURTS TO ALLOW AMENDMENTS TO PLEADINGS, INCLUDING AMENDMENTS TO PERFECT JURISDICTION.

A. Such Authority Derives From the Judiciary Act of 1789.

The court of appeals was unable to find any source of a power in a court of appeals "to preserve jurisdiction by dismissing a nondiverse party retroactively . . . ." *Newman-Green, Inc. v. Alfonzo-Larrain R.*, 854 F.2d at 919 (Pet. App. at A4). It rejected as possible sources of such authority not only § 1653 of Title 28 and Rule 21 of the Federal Rules of Civil Procedure but also any notion of "inherent" power. The dissenting opinion relied mainly on § 1653.

It appears that the issue may be more easily resolved than either opinion indicates. If there is a general power in the appellate courts to permit amendment of pleadings, and if it has been settled that the power possessed by district courts to permit amendment extends to amendments "to preserve jurisdiction by dismissing a nondiverse party retroactively," it can hardly be doubted that the appellate courts have such power unless Section 1653 or some other statutory provision has somehow curtailed the power that would otherwise exist. No one has suggested that the latter is true.

Section 32 of the Judiciary Act of 1789, 1 Stat. 73, 91, provided in relevant part as follows:

> Sec. 32. *And be it further enacted* . . . And the said courts respectively ["any of the courts of the United States"] . . . may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion, and by their rules prescribe.

This Court's decisions establish that Section 32 authorized the appellate courts to permit amendments to the pleadings in order to maintain federal jurisdiction. In *Kennedy v. Bank of Georgia*, 8 How. (49 U.S.) 586, 609-612 (1850), the question was whether a prior judgment was void for want of jurisdiction because the appellate court (*i.e.*, this Court) had not had power to accept a stipulation amending the pleadings to show diversity jurisdiction. The Court rejected that contention, stating:

> There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate, as well as original jurisdiction. (8 How. (49 U.S.) at 610-11.)

The opinion cited an 1814 opinion of Mr. Justice Story, sitting on circuit, to the same effect. *Anonymous*, 1 Gallis. 22, 1 F. Cas. 996 (D. Mass. 1814)(No. 444).

In *Norton v. Larney*, 266 U.S. 511 (1925), the complaint failed to allege facts showing that the cause of action arose under federal law. The district court did not notice the defect in jurisdiction. The court of appeals noted it but satisfied itself that the record showed a cause of action so arising. 266 U.S. at 513. This Court stated that there could be no jurisdiction unless the jurisdictional facts were supplied by amendment to the pleadings, but that the pleadings could be amended at any stage of the proceedings. 266 U.S. at 515-16. Then, after acknowledging that "the practice of this court has been to remit the question of amendment to the lower court unless the parties consented to an amendment here," Mr. Justice Sutherland continued:

> But under § 954, Rev. Stats., the *power* of this court, *in its discretion*, to allow such amendments . . . and its *duty* to do so in appropriate cases, cannot be doubted. . . . [W]here the amendment must necessarily be allowed by the trial court, it would be mere ceremony to reverse the decree and remit the purely formal making of the amendement [sic] to the lower court. We shall, therefore, consider the bill as amended to conform to the facts of record and sustain the jurisdiction of the district court. (266 U.S. at 516. Emphasis added.)

The Court then proceeded to decide the merits. *Accord Realty Holding Co. v. Donaldson*, 268 U.S. 398 (1925).

Section 954 of the Revised Statutes, referred to in the *Norton v. Larney* opinion, was Section 32 of the Act of 1789, slightly revised. It continued on the statute books as 28 U.S.C. § 777 until the 1948 revision of the Judicial Code, when it was repealed. Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 869, 993. The legislative history of the 1948 Act indicates that Section 777 was omitted from the new Judicial Code because it was already "[c]overed by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure." H.R. Rep. No. 308, 80th Cong., 1st Sess. A239 (1947). The Advisory Committee's notes to the Rules refer to Section 777 as a source for each of those rules. Advisory Committee on Rules for Civil Procedure, *Report of the Advisory Committee* 1, 11, 35 (April 30, 1937).

From this history several conclusions emerge:

1. There is no need to rely on some vague and unconfined notion of "inherent" power to support the action of a court of appeals in permitting amendment of the pleadings to cure jurisdictional defects that are capable of being cured by amendment. That power was conferred on the appellate courts by Congress from the very beginning. Congress has done nothing to indicate an intention to eliminate or narrow the power. The repeal in 1948 was apparently done on the assumption that the adoption of the Federal Rules ten years earlier had made the provisions redundant.

2. The power existed, and had been affirmed by this Court, at the time of the decision in *Continental Insurance*

Co. v. Rhoads, 119 U.S. 237 (1886) which apparently gave rise to the idea that only the trial court could allow an amendment. Without consideration of Section 32 of the Judiciary Act of 1789 or the earlier decisions applying it, the Court said "the record cannot be amended here . . . ." 119 U.S. at 237. *Continental Insurance v. Rhoads* was followed in several other brief decisions at the same Term (all authored by the same justice, Chief Justice Waite). *Halsted v. Buster*, 119 U.S. 341 (1886); *Peper v. Fordyce*, 119 U.S. 469 (1886); *Everhart v. Huntsville Female College*, 120 U.S. 223 (1887); *Menard v. Goggan*, 121 U.S. 253 (1887). The statement that "the record cannot be amended here" was picked up from those cases in *Denny v. Pironi*, 141 U.S. 121 (1891). In none of the cases was the question of the power of the appellate court discussed. The decisions appear to be aberrational, overlooking Section 32 of the first Judiciary Act. The aberration was corrected by the Act of March 3, 1915, Pub. L. No. 278, 38 Stat. 956, *codified as* 28 U.S.C. § 399 (1940 ed.), which provided that "either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose," to show diverse citizenship where "such diverse citizenship in fact existed at the time the suit was brought."

3. The Advisory Committee's reference to 28 U.S.C. § 777 as a source for Rule 15, among others, solves two problems. First, it eliminates the question raised by the *en banc* opinion (854 F.2d at 924-25 (Pet. App. at A15)) whether Rule 21 impermissibly "extends" federal jurisdiction if construed to permit dropping nondiverse parties.[3] Second, it provides an adequate link for treating Rule 21 (or Rule 15, as may be appropriate) as applicable

[3] There has been a difference of view as to whether Rule 15 or Rule 21 is the proper source of district court authority for dismissal of parties to perfect diversity jurisdiction. *Compare Kerr v. Compagnie de Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958) *with Ralli-Coney, Inc. v. Gates*, 528 F.2d 572, 575 (5th Cir. 1976).

(Footnote continued on the following page)

by analogy in the courts of appeals. As the majority opinion below concedes, "The *principle* underlying a particular rule may apply to the appellate court independently of the rule itself." 854 F.2d at 926 (Pet. App. at A17) (emphasis in original). Here the "overarching principle applicable alike to trial and to appellate courts" (*id.* (Pet. App. at A18)) is old 28 U.S.C. § 777 and its ancestor, Section 32 of the Judiciary Act of 1789.

In short, there is a firm statutory and decisional foundation, independent of Section 1653, for the existence in the federal appellate courts of authority to rectify jurisdictional defects by permitting amendment of pleadings on appeal, where such correction is appropriate. That foundation provides ample support for the numerous modern decisions that have permitted what the court below has held to be forbidden. *See* cases cited in the dissenting opinion below, 854 F.2d at 928 (Pet. App. at A22). *Accord Anderson v. Moorer*, 372 F.2d 747, 750 (5th Cir. 1967). Indeed, Section 32 of the Judiciary Act of 1789, though not referred to in Chief Justice Marshall's opinion in *Carneal v. Banks*, strengthens the inference that that case itself stands for the proposition that the appellate court may dismiss a nonindispensable defendant in order to maintain diversity jurisdiction. (*See* discussion *supra* pp. 7-8.)

The authorities discussed above also show that this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952), permitting the adding of a party in this Court in order to "create" Article III jurisdiction, was but an exercise of a power long recognized and need not be accounted

3 *(Continued)*
The Advisory Committee's references to § 777 would suggest that Rule 15 is the correct rule, but the point in the text is equally valid as to Rule 21: The authority to perfect jurisdiction by retroactively dropping a party was derived from § 777 (as well as previous decisional law) and hence represents no "extension" of federal jurisdiction.

for by the strained explanation that it involved only a "nominal" change of parties. *Compare* 854 F.2d at 920-921 (Pet. App. at A7-8) *with* 854 F.2d at 936 (Pet. App. at A37-38).

B. Section 1653 Does Not Reduce Such Authority And May Properly Be Read As Reinforcing It.

In the light of the preceding discussion, the difference of views between the majority and dissenting judges below as to the proper interpretation of § 1653 of Title 28 is not critical to the resolution of the issue of power. The majority opinion does not suggest that Section 1653 (or its predecessor, the Act of March 3, 1915, Pub. L. No. 278, 38 Stat. 956, 28 U.S.C. § 399 (1940 ed.)) *curtailed* the authority of the appellate courts, only that it may not be interpreted to *confer* the power the panel exercised in this case. 854 F.2d at 919-20 (Pet. App. at A4-6).

Nor could it well be argued that the Section did limit or withdraw any such authority. The 1915 act was plainly intended to be remedial, and to correct the specific self-denial of authority that *Continental Insurance v. Rhoads* and cases following it had introduced. The measure "was drawn to meet a difficulty which sometimes arises in practice and has caused grievous injustice"–namely, the upsetting of judgments because of failure to insert in a pleading the proper allegations of citizenship. *See* H.R. Rep. No. 162, Pt. 2, 63d Cong., 2d Sess. 2 (1914). The 1948 revision of Title 28, which resulted in the present § 1653, broadened, rather than restricted, the scope of the 1915 act. *See* 854 F.2d at 920, 933 (Pet. App. at A6, A32).

As Judge Biggs observed in an opinion relying on Section 1653 to permit a jurisdiction-curing addition of a party in a patent suit, "The strictness or lack of strictness with which Section 1653 has been applied has varied widely from court to court." *Moore v. Coats Co.*, 270 F.2d 410, 412 (3d Cir. 1959). The *Moore* opinion, and others referred to therein, indicate that Section 1653 should be "liberally"

construed. As stated in *Moore*, "It was the intention of Congress to permit amendment broadly to avoid the dismissal of suits on technical grounds." 270 F.2d at 412.

If amending "defective allegations of jurisdiction" can include adding a party and adding claims against that party, as the *Moore* opinion holds, there is no obvious reason why the phrase may not include dropping a party and dropping claims against that party. "Defective" may encompass flaws other than omissions, and it requires no strain on language to treat allegations "of" jurisdiction as including all allegations of a complaint that determine whether jurisdiction exists. Modern pleading is not so formal as to justify compartmentalizing a complaint between allegations "of" jurisdiction and allegations that "support," "affect," "relate to," or "defeat" jurisdiction.

Section 1653, like other statutes, cannot be applied literally and without reference to its purposes and its relationship to other legal principles. Literally, the section in its present form would permit amending an allegation of citizenship to reflect a change of citizenship *after* the complaint was filed, since the 1948 revision omitted the previous limitation to cases where diversity "in fact existed at the time the suit was brought." Act of March 3, 1915, 38 Stat. 956, 28 U.S.C. § 399 (1940 ed.). However, settled principles against that kind of retroactivity forbid such a construction. On the other hand, to treat the section as not authorizing *any* kind of "retroactive creation" of jurisdiction, as the majority opinion below seems to suggest, would deprive it of any use. An equally settled principle is that federal jurisdiction does not exist unless it is shown by the allegations of the complaint. *See, e.g., Norton v. Larney*, 266 U.S. 511, 516 (1925). Therefore *any* amendments that correct "defective allegations of jurisdiction" necessarily result in "creating" jurisdiction "retroactively."

If Section 1653 is construed in the light of its history and purpose, there is little difficulty in treating it as

authorizing the appellate courts to do whatever the district courts may do to rectify jurisdictional defects by allowing amendments of the pleadings. Section 1653 and its predecessor, the 1915 statute, should be viewed as having revived and reinforced a lengthy previous understanding that the appellate courts are not disabled, in appropriate cases, from allowing amendments that avoid needless delay and redundant proceedings in lower courts. *Cf. Carson v. Allied News Co.*, 511 F.2d 22, 24 n. 4 (7th Cir. 1975) (suggesting that the statute may have "removed the predicate" for the Seventh Circuit's earlier decision refusing to permit the dropping of a party on appeal).

III.

THERE ARE NO POLICY OR FUNCTIONAL REASONS WHY A COURT OF APPEALS SHOULD INVARIABLY ALLOW THE DISTRICT COURT TO DECIDE WHETHER TO PERMIT DISMISSAL OF THE NONDIVERSE PARTY.

The opinion below suggests that a reason for the assumed lack of power in the appellate court to allow dismissal of the nondiverse party is a functional one, *i.e.*, that the district court is in a better position to judge whether the other parties have been prejudiced by the presence of the nondiverse party. 854 F.2d at 924 (Pet. App. at A14). In support, the opinion invokes the analogy of the fact-finding function. *Id.* at 926 (Pet. App. at A18).

It is perhaps a sufficient answer to note that Rule 52 explicitly limits the fact-finding role of the appellate courts and there is no equivalent limitation on the power of the appellate courts with respect to amendments. On the contrary, Section 1653 of the Judicial Code expressly equates the powers of the district courts and the appellate courts in the situations to which it applies and, as we have seen, Section 32 of the Judiciary Act of 1789 did the same.

More importantly, the determination whether prejudice in a legal sense has occurred may or may not depend

on facts or inferences as to which the district judge is in a superior position, and in any event a refusal by the district court to allow dismissal of the spoiling party (*i.e.*, an order that the case as a whole must be dismissed) is clearly subject to review for abuse of discretion. Courts have frequently remanded cases to the district court with directions to allow amendment dismissing nondiverse parties in order to preserve federal jurisdiction. *Kerr v. Compagnie de Ultramar*, 250 F.2d 860 (2d Cir. 1958); *Prescription Plan Service Corp. v. Franco*, 552 F.2d 493 (2d Cir. 1977); *Jaser v. New York Property Ins. Underwriting Ass'n*, 815 F.2d 240 (2d Cir. 1987); *Carson v. Allied News Co.*, 511 F.2d 22 (7th Cir. 1975). If a case is an appropriate one in which to give mandatory directions to the district court to permit curing jurisdiction, no reason appears why the appellate court, having power itself to permit the amendment, should not do so.

The present case is a clear instance in which a court of appeals could properly find no prejudice, as the panel opinion did. The dissenting opinion below fully explains the reasons why the only kind of prejudice asserted by the respondents is not the kind that warrants dismissing these lengthy proceedings and starting anew. 854 F.2d at 937-39 (Pet. App. at A40-43). It was within the power of the court to conclude that those reasons would require reversing any conclusion of the district court to the contrary. *Cf. Camp v. Gress*, 250 U.S. 308, 317 (1919); *Kerr v. Compagnie de Ultramar*, 250 F.2d at 864. Therefore the court could properly decline to dismiss the case and proceed to the merits.

Contrary to what is suggested in the opinion below (854 F.2d at 924 (Pet. App. at A14)), no tactical advantage is conferred on the plaintiff by deciding the merits if the appellate court exercises its power, permits the unnecessary party to be dropped, and only then reaches the merits. The "tactical advantage" can arise only if the appel-

late court remands to allow the district court to decide whether the jurisdictional defect may be cured, and at the same time expresses an opinion on the merits. In this case the panel gave both sides the opportunity to address the jurisdictional defect before it decided the case. Petitioner moved to dismiss Bettison and the respondents moved to dismiss the case for want of jurisdiction. The panel granted petitioner's motion and only then proceeded to the merits. Thus petitioner made its election without knowledge of how the merits would be decided and was bound by its election and would equally have been bound by an adverse decision on the merits. The reasons given by the *en banc* opinion are insufficient to deprive petitioner of the benefit of the panel's decision on the merits.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

PHIL C. NEAL*
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000

Attorney for Petitioner

** Counsel of Record*

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

MICHAEL D. SHER
GEORGE M. HOFFMAN
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEWMAN-GREEN, INC.,

Petitioner,

v.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

F ANK K. HEAP *
CHARLES G. ALBERT
WILLIAM L. BARR, JR.
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Respondent

Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether a federal court that lacks subject matter jurisdiction may manufacture such jurisdiction.

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No. 88-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEWMAN-GREEN, INC.,
Petitioner,

v.

ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

JURISDICTION

In 1982, plaintiff, NEWMAN-GREEN, INC. (NGI), filed a complaint in Federal District Court for the Northern District of Illinois. Federal jurisdiction was premised, exclusively, on diversity of citizenship between the parties. The complaint named five individual defendants, ALEJANDRO ALFONZO-LARRAIN, R., IRENE LARRAIN DE CAPLAN, RAFAEL

TUDELA, ALBERTO TUDELA, and WILLIAM L. BETTISON ("BETTISON"). The first four of these five individuals are Venezuelan citizens. The fifth, BETTISON, is a stateless United States citizen, residing in Venezuela. The Seventh Circuit unanimously held that his presence in the case destroyed complete diversity between the parties and, hence, federal subject matter jurisdiction based on diversity of citizenship. At the first hearing on appeal, the panel suggested to plaintiff, and then granted, a motion by plaintiff to dismiss BETTISON in order to create, *nunc pro tunc*, federal diversity jurisdiction for itself. At the same time, the court denied defendants' motion to dismiss the case for want of federal subject matter jurisdiction. On rehearing, *en banc*, the full Seventh Circuit vacated the panel's order dismissing BETTISON and remanded the case for hearing before the district court under Rule 21 to determine whether BETTISON's dismissal would unduly prejudice the remaining defendants. The matter is presented here with BETTISON still a party and federal subject matter jurisdiction still lacking. Accordingly, it is respectfully submitted that this case should be dismissed for want of subject matter jurisdiction.

ARGUMENT

I.

A COURT WITHOUT SUBJECT MATTER JURISDICTION HAS NO POWER TO CREATE IT.

Writing for the original Seventh Circuit panel in this case, Judge Easterbrook succinctly observed: "There is an obstacle to reaching [the substantive] issue, however: subject matter jurisdiction. We haven't any." (832 F.2d at 419, Pet. App. B-4)[1]

In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), this Court stated:

> "Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is power to declare the law and, when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." 74 U.S. (7 Wall.) at 514.

Article III, Section 2 of the Constitution for the United States delineates the powers granted to a federal court and provides for federal subject matter jurisdiction of those matters where diversity of citizenship exists. *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806). Nevertheless, the Seventh Circuit has contorted the Federal Rules of Civil Procedure in an attempt to establish federal subject matter jurisdiction where none constitutionally can exist.

The Federal Rules of Civil Procedure are expressly limited as follows:

---

[1] "Pet. App." refers to the appendices to the printed petition for a writ of certiorari.

First, Rule 1 states: "These rules govern the procedure in the United States *district courts* in all suits of a civil nature. . . ." (Emphasis added.)

Second, Rule 12(h)(3) states: "Whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." (Emphasis added.)

Third, Rule 82 states: "These rules *shall not* be construed to *extend* or limit the jurisdiction of the United States district courts. . . ." (Emphasis added.)

Despite the plain language of these rules, lower courts have stretched either Rule 15 (*see, e.g. Kerr v. Compagnie De Ultramar*, 250 F.2d 860 (2d Cir. 1958)) or Rule 21 (*see, e.g. Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976)) to *create* federal diversity jurisdiction retroactively. Such use of these rules exceeds their intended scope and, more importantly, is unconstitutional.[2] Therefore, this Court should end this practice by dismissing this cause for want of federal subject matter jurisdiction.

II.

DIVERSITY JURISDICTION MUST EXIST, IN FACT, AT THE TIME A COMPLAINT IS FILED.

Article III, Section 2 of the Constitution for the United States requires that diversity of citizenship between parties exist at the time a complaint is filed in order for

[2] Article III, Section 2 limits federal jurisdiction *inter alia* to actions . . . between a state, or the citizens thereof, and foreign states, citizens or subjects, or between citizens of different states. Here, BETTISON, is a stateless citizen of the United States. Since he is neither a citizen of one of the United States nor a foreign citizen or subject, the Constitution of the United States does not provide federal subject matter jurisdiction for the instant matter in which he is a named defendant.

federal jurisdiction to exist. *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 536 (1824). Notwithstanding the age and simplicity of this rule, plaintiff proposes that this Court abandon it and adopt, in its place, a piecemeal jurisdictional analysis, which would require the district court to determine as to each "claim":

1) whether each defendant is, in fact, diverse;

2) whether a nondiverse defendant is dispensable;

3) whether the dismissal of a nondiverse, dispensable defendant will prejudice remaining defendants; and

4) if so, what terms, if any, may be imposed upon the movant and the other parties to dispel such prejudice.

The course which plaintiff suggests to "expedite" the resolution of this case would add a new dimension to federal motion practice and, at the same time, impose new burdens on an already overburdened federal judiciary.

While inconvenient for the parties now before this Court, consistent and firm application of the constitutionally mandated requirement of complete diversity from the outset of a case would foster greater care by plaintiffs and their counsel, as well as provide the federal bench with a simple perfunctory procedure to follow whenever it determines that it lacks subject matter jurisdiction.

III.

THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT GRANT ANY FEDERAL COURT THE POWER TO CREATE ITS OWN JURISDICTION.

The current district court practice of permitting a plaintiff to drop a nondiverse defendant in order to create federal diversity jurisdiction has been justified as "permitting

an amendment" *Kerr v. Compagnie De Ultramar*, 250 F.2d 860 (2d Cir. 1958) (Rule 15), or "permitting the correction of a misjoinder" *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976) (Rule 21). These differing characterizations of a legal fiction represent the best efforts of the lower courts to twist procedural rules in order to obtain jurisdiction of cases which properly belong in state court. One circuit affirming such action candidly acknowledged that, in its jurisdiction, "practicality prevailed over logic." (*Continental Airlines, Inc. v. Goodyear Tire & Rubber Company v. Continental Airlines, Inc.*, 819 F.2d 1519, 1523 (9th Cir. 1987)) Indeed, the court, more accurately, could have observed that practicality had been allowed to prevail over the Constitution for the United States.

Unfortunately, this practice has become so commonplace that the Seventh Circuit felt obliged not to reconsider interpretations of Rules 15 or 21, which allow such action by the district courts. As noted by Judge Posner, "So many cases have adopted that interpretation that a court at our level probably can no longer re-examine it." 854 F.2d at 925 (Pet. App. A-15).

Notwithstanding the acceptance of this practice in the lower courts, respondents ask this Court to reject the strained interpretations which have been applied to Rules 15 and 21 in favor of the fundamental principle that, when a federal court determines that it lacks subject matter jurisdiction, it has no power to do anything other than dismiss the case. *Ex parte McCardle, supra.*

A. Rule 15—Amended And Supplemental Pleadings.

The Second Circuit has adopted the approach that Federal Rule 15 is the appropriate vehicle by which a plaintiff may drop a nondiverse defendant from a case. In *Kerr*

v. Compagnie De Ultramar, id., the court held that plaintiff's naming of the nondiverse defendant was not a Rule 21 misjoinder, because all the parties were correctly joined as ". . . joint tortfeasors or as liable in the alternative."

Citing Rule 15(a), the *Kerr* court suggested that permitting an amendment of the pleadings would include granting plaintiff's motion to dismiss the nondiverse defendant. In doing so, it chose to ignore 28 U.S.C.A. Section 1653, which is the only provision that, specifically, relates to amending improperly pleaded elements of jurisdiction. In effect, the Second Circuit's interpretation of Rule 15 reduced Section 1653 to mere surplusage, because it would have no application other than that which, under that interpretation, would already be served by Rule 15.

The Second Circuit was forced to adopt this approach because Section 1653 already had been interpreted as *only* allowing amendments to pleadings where such amendments reflected sufficient jurisdictional facts *which existed at the time a case was filed.* (See discussion by Judge Posner below, 854 F.2d at 919). Since the panel sought to *change* a fact which defeated jurisdiction, it needed to apply a different rule, which carried no such restrictive decisional baggage.

In doing so, the court ignored an important principle of statutory construction, which requires it to consider the entire context in which a rule appears, so that its interpretation and application of that rule is consistent with all other related rules enacted by the Legislature. In this way, the legislative intent as to the interpretation and application of these rules is best determined since it is presumed that neither the Congress nor this Court intended two different rules to conflict with or overlap each other.

In this case, the constitutional elements necessary to establish federal subject matter jurisdiction were not properly pleaded because they did not, and do not, in fact, exist. One statute, 28 U.S.C. Section 1653, entitled "Amendment of Pleadings to Show Jurisdiction," specifically applies. Another, Rule 15 of the Federal Rules of Civil Procedure, entitled "Amended and Supplemental Pleadings," never mentions jurisdiction and plainly concerns the form in which a claim or defense is pleaded rather than improperly pleaded jurisdictional facts. Reading the two provisions together, it is immediately apparent that this Court and the Legislature intended Rule 15 to be applied by the district courts to allow parties a full opportunity to amend their pleadings in order to allege the necessary elements of a cause of action or defense. Section 1653, *not Rule 15*, was intended to allow defective allegations of jurisdiction to be amended, but *only* where a factual basis for federal jurisdiction existed at the time the case was filed. (854 F.2d at 919) (Pet. App. A-6) When, as here, such facts do not exist, Rule 12(h)(3) states:

> "Whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Reviewing these provisions in the context in which they were enacted, only one conclusion may be drawn: they were never intended to provide a vehicle for a federal court to create subject matter jurisdiction where none exists. Interpreting them in the fashion urged by petitioner would require Rule 12(h)(3) to apply *sometimes*, instead of as it states, "*Whenever* . . . the court lacks jurisdiction of the subject matter." (Emphasis added.)

Finally, Rule 82, entitled, "Jurisdiction and Venue Unaffected," specifies that: "These rules shall not be construed to extend or limit the jurisdiction of the United

States district courts. . . ." Expanding the scope of the term "amendment" in Rule 15 to include "dismissal of a nondiverse party in order to create federal diversity jurisdiction" *necessarily* constitutes extending the district court's jurisdiction to encompass a state court claim. The mental gymnastics necessary to accomplish this semantic back flip suggests that the plain meaning of the rules should be followed.

B. Rule 21—Misjoinder And Nonjoinder Of Parties.

To interpret this rule to allow the dismissal of a properly joined, albeit nondiverse defendant, is, simply, to ignore the commonly accepted meaning of the legal term "misjoinder." In the instant case, five guarantors to a contract were sued by plaintiff, NGI, for one claim. Plaintiff's claim against BETTISON is no different from its claim against the other four defendants. Hence, BETTISON's inclusion in this case was not a misjoinder, but rather a tactical mistake, which destroyed federal subject matter jurisdiction.

Notwithstanding the absence of federal subject matter jurisdiction, the Seventh Circuit panel chose to deny defendants' motion to dismiss the cause for want of subject matter jurisdiction and then granted plaintiff's motion brought under Rule 21 to dismiss BETTISON, *with prejudice*. The circumstances of the entry of the dismissal order in this case again points up the basic flaw in the panel's reliance upon some nebulous combination of Rule 21 and Section 1653. Not only did the panel's application of these rules impermissibly extend federal subject matter jurisdiction, but it also created an insoluble jurisdictional dilemma, to wit: How can a court dismiss, *with prejudice*, a claim over which it had no subject matter jurisdiction?

IV.

THERE HAS NEVER BEEN STATUTORY AUTHORITY WHICH GAVE THE APPELLATE COURT THE POWER TO MANUFACTURE FEDERAL JURISDICTION.

Section 32 of the Judiciary Act of 1789 did not grant the federal district or appellate court the power or authority to allow the court to dismiss a nondiverse party in order to create federal jurisdiction. As set forth in that statute:

> "That no summons, writ . . . shall be abated . . . for any defect . . . but the said courts respectively shall proceed . . . without regarding any . . . defects . . . in such . . . writ . . . *except those only in case of demurrer*. . . .
>
> . . . and the said courts respectively shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants of form, *other than those which the party demurring shall express as aforesaid*." (Emphasis added.)

The statute's purpose was to alleviate the harsh consequences resulting from stylistic errors, which, as the statute provided, could be corrected or ignored by the court in the absence of a *demurrer*. Plainly, this rule was not intended, and could not be used to change facts, which existed at the time the suit was filed. However, amendments to conform pleadings to the existent facts have, generally, been allowed. *Mullen v. Torrance*, *supra*.

This interpretation of the application of Section 32 is borne out by a review of *Carneal v. Banks*, (10 Wheat.) 23 U.S. 181 (1825). In that case, there was no reference to Section 32 of the Judiciary Act and no indication that the nondiverse parties were before the court. The court, acting on its own, dismissed defendant's crossbill as to

them. Indeed, since the nondiverse parties were brought into the case by the defendant's crossbill, it appears that, in today's terms, they were, in fact, dispensable, nondiverse third-party defendants against whom plaintiff made no claim. Therefore, their presence as such would not have destroyed federal diversity jurisdiction in any event. See, *Stemler v. Burke*, 344 F.2d 393 (6th Cir. 1965); *Sheppard v. Atlantic States Gas Co. of Pa.*, 167 F.2d 841 (3rd Cir. 1948).

In *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873), two daughters of a deceased man named Horn, who lived in Texas and whose married names were Lockhart, filed an action based on diversity of citizenship in the Circuit Court for the Southern District of Alabama. The bill filed by the Lockharts was (a) to set aside a will; (b) to have distribution made of the estate; and (c) for an account against the executor. The bill named as defendants Horn, Jr., as the executor, Horn's widow and Horn's other sons. All of these individuals were Alabama residents. The bill also named as defendants Horn's remaining daughter and her husband named McPhail, both of whom, like plaintiffs, resided in Texas. Diversity jurisdiction in the case was premised on the Lockharts' claim for an accounting against the Alabama executor.

The action to set aside the will and distribute the estate was a pendent matter to the Lockhart's bill for an accounting from the executor, Horn, Jr. When the action to set aside the will was dismissed, the only defendant from whom plaintiffs continued to seek relief was the executor, Horn, Jr. Thus, neither the presence nor the dismissal of the McPhails affected the court's exercise of diversity jurisdiction over Lockharts' bill for an accounting from the executor. Accordingly, Judge Posner's pro-

posed realignment (854 F.2d at 921) (Pet. App. A-9) of the parties was unnecessary, since the pendent cause, which involved the McPhails, was dismissed.

In *Ex parte McCardle*, *id.*, this Court found that, by specifying and later repealing a specified grant of subject matter jurisdiction, Congress had granted and then removed jurisdiction of such subject matter from this Court.

Because diversity jurisdiction is defined in Article III, Section 2 of the Constitution for the United States, in the absence of making a constitutional amendment, Congress lacks the power to vest the circuits with authority to allow parties to create diversity jurisdiction for themselves. By repealing their predecessor statutes, including Section 32 of the Judiciary Act of 1789, and enacting the Federal Rules of Civil Procedure, Congress granted the district courts, and not the circuit courts, the power to wield the Federal Rules of Civil Procedure. The suggestion that such power in the appellate branch may be inferred from these rules is expressly refuted by the first Federal Rule of Civil Procedure, which states, "These rules govern the procedure in the United States District Courts. . . ."

Any remnant of inherent appellate authority to amend pleadings that existed after the repeal of the Judiciary Act of 1789 and its ultimate successor, 28 U.S.C. Section 777, was extinguished by its repeal in the 1948 revision of the Judicial Code, Congress' Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 869, 993. Therefore, federal appellate power to amend pleadings does not exist except where specified in legislation. The only statute which grants such power on appeal is Section 1653.

V.

SECTION 1653 SETS FORTH THE FULL EXTENT OF THE FEDERAL COURTS' AUTHORITY TO AMEND PLEADINGS TO CORRECT DEFECTIVE ALLEGATIONS OF JURISDICTION.

The only written word approved by Congress on the subject of federal appellate authority to amend defective allegations of subject matter jurisdiction is found in Section 1653 (28 U.S.C. Section 1653). Plaintiff argues that this section bolsters its position. Actually, the converse is true. Indeed, Section 1653 categorically refutes the inference which plaintiff urges upon this Court, because both the language of the provision, as well as the legion of cases interpreting it, demonstrate that it is to be applied only when the elements of federal jurisdiction actually exist at the outset of a case, but have been improperly pleaded.[3]

In this regard, plaintiff's summary of *Moore v. Coats*, 270 F.2d 410 (3rd Cir. 1959) is misleading, since it was a patent case and a party was added to cure a venue problem. In that case, the *pro se* plaintiff filed in a jurisdiction where the original defendants did not do business. He was allowed to amend his complaint to add the local defendant as a contributory infringer. Federal jurisdiction arose because the case was based on federal law, not the diversity of citizenship of the defendants.

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[3] At A-6, Judge Posner noted, ". . . all seven circuits to have discussed the scope of Section 1653 have said that it is intended only to enable the courts of appeals to remedy inadequate jurisdictional allegations, not defective jurisdiction itself."

In the instant case, the Seventh Circuit, *en banc*, delineated its power to amend jurisdictional pleadings as follows:

> "If the jurisdictional *allegations* are defective, but there was jurisdiction when the complaint was filed, we can cure the defect under Section 1653." (Emphasis added.)

This is the simple, sensible rule, which has been established by the weight of precedent. It does not include a "free-floating discretionary power" in the appellate court to cure defects in the jurisdiction of the district courts. Further, it does not constitute the retroactive creation of subject matter jurisdiction. Rather, it permits the pleader to correct or add allegations necessary to the establishment of federal jurisdiction so long as those amendments reflect facts, which existed at the time the complaint was filed.

CONCLUSION

As hard as it is to accept the inconvenience suffered by the parties and the court in this instance, it is wrong to suggest that fundamental judicial principles of federal subject matter jurisdiction and the limitations placed on federal subject matter jurisdiction by the Constitution for the United States should be cast aside for the sake of expedience.

Since, here, it is not the allegations, but the *facts* which were defective, the federal courts are without power to act and must dismiss this case for want of jurisdiction.

Respectfully submitted,

FRANK K. HEAP *
CHARLES G. ALBERT
WILLIAM L. BARR, JR.
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Respondent

* Counsel of Record

Dated: March 24, 1989

REPLY

BRIEF

Supreme Court, U.S.
FILED
APR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-774

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REPLY BRIEF FOR PETITIONER

PHIL C. NEAL*
208 South LaSalle Street
Chicago, Illinois 60604
(312) 269-8000
Attorney for Petitioner

Of Counsel:
ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

MICHAEL D. SHER
GEORGE M. HOFFMAN
DAVID A. EIDE
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Chicago, Illinois 60604

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Respondents now seek revision of the judgment below, in spite of the fact that they filed no cross-petition.

The judgment below vacated the district court's judgment and remanded the case to enable the district court to consider whether to permit the plaintiff to perfect jurisdiction by dismissing the nondiverse defendant. 854 F.2d

at 923-24, 927 (Pet. App. at A13-15, A19). Respondents' brief on the merits attacks that disposition (although their opposition to the petition for certiorari expressly supported it). They contend that the exercise of such a power by the district court would be unconstitutional, and they request that this Court order dismissal of the case. R. Br. at 2, 4, 6, 15; *compare* Brief in Opposition at 7. Respondents sought the same disposition in the court below, which rejected their motion to dismiss. *See* 854 F.2d at 923, 924-25, 929-30 (Pet. App. at A13, A15-16, A25).

"An argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *see also Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

2. Respondents' argument, even if it were properly before this Court, asks the Court to overturn a steady course of decision more than 150 years old on the basis of a faulty constitutional premise. Since the complete-diversity rule is not mandated by Article III, *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967), Article III clearly does not prevent Congress from authorizing, or the federal courts from approving, "retroactive" amendments to achieve complete diversity in cases that from their inception satisfy the constitutional requirement of minimal diversity.

Absent a compelling reason of constitutional magnitude, there would seem to be little need to re-examine the wisdom of a practice that was approved by this Court at least as early as *Conolly v. Taylor*, 2 Pet. (27 U.S.) 556 (1829), and as late as *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 19 n.18 (1951), and that has been followed apparently without deviation in countless lower court decisions. The *en banc* opinion below characterized

the practice as one that "ha[s] over a period of many years commanded the unanimous support of judges of diverse background" (854 F.2d at 925 (Pet. App. at A16)) and the dissenting opinion described it as "one of the most venerable jurisdictional principles" (854 F.2d at 931 (Pet. App. at A27)). An incomplete listing of cases only in the courts of appeals includes: **D.C. Circuit:** *Long v. District of Columbia*, 820 F.2d 409 (1987); *Park v. Didden*, 695 F.2d 626 (1982); **First Circuit:** *H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 791 F.2d 987 (1986); **Second Circuit:** *Jaser v. New York Property Ins. Underwriting Ass'n*, 815 F.2d 240 (1987); *Samaha v. Presbyterian Hospital*, 757 F.2d 529 (1985); *Kerr v. Compagnie de Ultramar*, 250 F.2d 860 (1958); **Third Circuit:** *Field v. Volkswagenwerk AG*, 626 F.2d 293 (1980); *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065 (1979); *Riverside Memorial Mausoleum, Inc. v. UMET Trust*, 581 F.2d 62 (1978); *Girardi v. Lipsett, Inc.*, 275 F.2d 492, *cert. denied*, 364 U.S. 821 (1960); **Fourth Circuit:** *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683 (1978); *Weaver v. Marcus*, 165 F.2d 862 (1948); **Fifth Circuit:** *Aetna Casualty & Surety Co. v. Hillman*, 796 F.2d 770 (1986); *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (1976); *Ray v. Bird and Son and Asset Realization Co., Inc.*, 519 F.2d 1081 (1975); *Anderson v. Moorer*, 372 F.2d 747 (1967); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685 (1954); *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (1953), *cert. denied*, 347 U.S. 912 (1954); *Drumright v. Texas Sugarland Co.*, 16 F.2d 657, *cert. denied*, 274 U.S. 747 (1927); *Smith v. Consumers' Cotton Oil Co.*, 86 F. 359 (1898); **Sixth Circuit:** *Reed v. Robilio*, 376 F.2d 392 (1967); *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469 (1952); **Seventh Circuit:** *Carson v. Allied News Co.*, 529 F.2d 206 (1976); *Carson v. Allied News Co.*, 511 F.2d 22 (1975); *Mason v. Dullagham*, 82 F. 689 (1897); **Eighth Circuit:** *Shows v. Harber*, 575 F.2d 1253 (1978); *Fetzer v. Cities*

Service Oil Co., 572 F.2d 1250 (1978); *Montgomery Ward & Co., Inc. v. Langer*, 168 F.2d 182 (1948); *City Bond & Finance, Inc. v. Grant*, 30 F.2d 671 (1929); *Interstate Refineries, Inc. v. Barry*, 7 F.2d 548 (1925); *Jennings v. United States*, 264 F. 399 (1920); *Hopkins v. Oxley Stave Co.*, 83 F. 912 (1897); *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 F. 124 (1897), *aff'd*, 173 U.S. 99 (1899); **Ninth Circuit:** *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498 (1981); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273 (1980); *Roth v. Davis*, 231 F.2d 681 (1956); *Anglo California National Bank of San Francisco v. Lazard*, 106 F.2d 693 (1939), *cert. denied*, 308 U.S. 624 (1940); *Asher v. Bone*, 100 F.2d 315 (1938); *Dollar S.S. Lines, Inc. v. Merz*, 68 F.2d 594 (1934); **Tenth Circuit:** *Tuck v. United Services Automobile Ass'n*, 859 F.2d 842 (1988), *cert. denied*, 57 U.S.L.W. 3612 (U.S. March 20, 1989) (No. 88-1234); *Varley v. Tampax, Inc.*, 855 F.2d 696 (1988); *Harris v. Illinois-California Express, Inc.*, 687 F.2d 1361 (1982); *Miller v. Leavenworth-Jefferson Electric Cooperative*, 653 F.2d 1378 (1981); *Jett v. Phillips & Associates*, 439 F.2d 987 (1971); *Oppenheim v. Sterling*, 368 F.2d 516 (1966), *cert. denied*, 386 U.S. 1011 (1967); **Eleventh Circuit:** *Fritz v. American Home Shield Corp.*, 751 F.2d 1152 (1985).

3. Respondents argue that curing jurisdiction by dismissing a nondiverse party involves changing the "facts" that existed when suit was filed. *See* R. Br. at 7, 14, 15. The argument is in error. Amending to show a change of citizenship since the complaint was filed would be such a change. The predecessor of 28 U.S.C. § 1653 expressly forbade such an amendment, and it may be assumed that such a prohibition remains implicit in § 1653. *See* Pet. Br. at 17. The general principle that jurisdiction depends on the facts existing when the complaint is filed is not impaired by an amendment dismissing a party. All that is

changed is a pleading, not "facts," and the very purpose of § 1653 is to permit changing a pleading.

4. Respondents' reading of the facts of *Carneal v. Banks*, 10 Wheat. (23 U.S.) 181 (1825), is wrong. *See* R. Br. at 10-11. It was the plaintiff's bill against the nondiverse defendants, not the cross-bill, that the Court dismissed, and the plaintiff's bill did seek relief against the nondiverse defendants. (Contrary to respondent's statement, the Court expressly held that the cross-bill *was* within the diversity jurisdiction, because the cross-plaintiffs were all citizens of Kentucky and the cross-defendants were all citizens of Virginia.)

Notwithstanding what is said about *Carneal v. Banks* in either respondents' brief or in the *en banc* opinion below, the case remains an authority squarely supporting the power of an appellate court to order dismissal of a nondiverse, nonindispensable party and thereupon to decide the merits of the remaining controversy. *See* Pet. Br. at 7-8.

Respondents' treatment of *Horn v. Lockhart*, 17 Wall. (84 U.S.) 570 (1873), is equally curious, for there is no sense in which the plaintiffs' bill seeking to set aside the will was a "pendent matter" to the alternative demand for an accounting. *See* R. Br. at 11-12. The district court dismissed the nondiverse parties following a motion by the defendant executor to dismiss the case for want of diversity. This Court's opinion was a clear-cut affirmation of the practice that respondents' brief attacks as unconstitutional:

> And the question always is or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether, to a decree authorized by the case presented, they are indispensable parties, for if their interests are severable, and a decree without prejudice to their rights

can be made, the jurisdiction of the court should be retained and the suit dismissed as to them. (17 Wall. (84 U.S.) at 579.)

(In *Horn* the dismissal of the nondiverse parties did not occur until more than three years after the suit was filed and the case had been heard on the merits. At the same time that it gave judgment for the plaintiffs on their accounting claim against the executor, the trial court dismissed the jurisdiction-spoiling defendants. Thus the cure of jurisdiction was fully "retroactive" in validating the prior proceedings. Numerous subsequent decisions are to the same effect. *See, e.g., Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), holding, after remand from this Court's decision, *supra*, that the trial court erred in not reinstating the original verdict, instead of ordering a new trial, after dismissal of the nondiverse defendant. *And see* 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 21.03[2] (2d ed. 1987).)

5. Respondents pose an imagined conundrum as to the panel's dismissal of the nondiverse defendant "with prejudice," asking "How can a court dismiss, *with prejudice*, a claim over which it had no subject-matter jurisdiction?" R. Br. at 9 (emphasis in original). The answer lies in the fact that the court does have the power (contrary to respondents' major premise) to retain jurisdiction over the *case* if it dismisses the spoiler defendant. Having that power, it may condition the exercise of the power on the plaintiff's acceptance of the "terms" specified by the court, as § 1653 expressly provides. *Cf. Stern v. Inter-Mountain Telephone Co.*, 226 F.2d 409 (6th Cir. 1955) (voluntary dismissal "on terms" pursuant to Rule 41(a)(2)).

6. Respondents' arguments as to the meaning of Section 32 of the Judiciary Act of 1789 (R. Br. at 10) and the proper interpretation of § 1653 of Title 28 (R. Br. at

13-14) require no reply beyond what has been said in petitioner's main brief. *See* Pet. Br. at 11-18.[1]

CONCLUSION

For the reasons stated above and in petitioner's main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

PHIL C. NEAL *
208 South LaSalle Street
Chicago, Illinois 60604

Attorney for Petitioner

Of Counsel:

ROWE W. SNIDER
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

MICHAEL D. SHER
GEORGE M. HOFFMAN
DAVID A. EIDE
NEAL GERBER EISENBERG & LURIE
208 South LaSalle Street
Chicago, Illinois 60604

* Counsel of Record

[1] Since the filing of petitioner's main brief we have found another decision in conflict with the decision below, not noted in either of the opinions below or in the petition for certiorari. In *Underwood v. Maloney*, 256 F.2d 334, 339 (3d Cir. 1958) (per Biggs, Goodrich and Hastie, JJ.) the court "treat[ed] the case as if the court below had on its own motion dismissed [the nondiverse defendant]" in order to avoid the "needless waste" entailed in making the plaintiff start over again in the district court. The court quoted Mr. Justice Frankfurter's opinion in *Mullaney v. Anderson*, 342 U.S. 415 (1952), and cited Rule 21. The decision below is thus directly in conflict with decisions of the Third, Fifth, Ninth and District of Columbia Circuits and in conflict with decisions of the Second Circuit on closely analogous issues. *See* Pet. for Cert. at 4-5, Pet. Br. at 15.